

No. 11820

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

TAVARES CONSTRUCTION COMPANY, INC., a
corporation, CONCRETE SHIP CONSTRUCTORS,
a joint venture, STROUD-SEABROOK, a copartner-
ship, LLOYD S. STROUD, R. S. SEABROOK,
C. M. ELLIOTT, CARLOS TAVARES, HENRY
M. PAGE and DON F. GATES,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

TRANSCRIPT OF RECORD

(In Four Volumes)

VOLUME II

(Pages 373 to 740, Inclusive)

Upon Appeal From the District Court of the United States
for the Southern District of California

Southern Division

FILED

MAR 12 1948

PAUL P. O'BRIEN, CLERK

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Stroud, [314] R. S. Seabrook, C. M. Elliott, Carlos Tavares, Henry M. Page and Don F. Gates that plaintiff may serve upon said defendants and file on or before September 29, 1947, plaintiff's designation of portions of the record, proceedings and evidence to be contained and included in the record on appeal of said defendants from the judgment herein.

Dated: This 12th day of September, 1947.

JAMES M. CARTER

United States Attorney

By Francis C. Whelan

Special Assistant to the Attorney General

Attorneys for Plaintiff United States of
America

JOHN M. MARTIN and

FRANK L. MARTIN, JR.

By Frank L. Martin, Jr.

Attorneys for Tavares Construction Company, Inc., a corporation, Concrete Ship Constructors, a joint venture, Stroud-Seabrook, a co-partnership, L. S. Stroud, R. S. Seabrook, C. M. Elliott, Carlos Tavares, Henry M. Page and Don F. Gates, Defendants

ORDER EXTENDING TIME IN WHICH PLAINTIFF MAY SERVE AND FILE DESIGNATION OF ADDITIONAL PORTIONS OF RECORD, PROCEEDINGS AND EVIDENCE TO BE INCLUDED IN THE RECORD ON APPEAL

Good cause appearing therefor; It Is Hereby Ordered that plaintiff United States of America may on or before September 29, 1947, serve upon defendants Tavares Construction Company, Inc., a corporation, Concrete Ship Constructors, a joint venture, Stroud-Seabrook, a co-partnership, L. S. Stroud, R. S. Seabrook, C. M. Elliott, Carlos Tavares, Henry M. Page and Don F. Gates and file plaintiff's designation of additional portions of the record, proceedings and evidence to be included in the record on appeal from the judgment in the above entitled action taken by said defendants, and the time within which plaintiff may serve and file such designation is hereby extended to and including September 29, 1947.

Dated: This 12th day of September, 1947.

PAUL J. McCORMICK

United States District Court Judge

[Endorsed]: Filed Sep. 12, 1947. Edmund L. Smith, Clerk. [315]

[Title of District Court and Cause]

STIPULATION EXTENDING TIME FOR FILING
AND DOCKETING OF RECORD ON APPEAL
IN APPELLATE COURT

It appearing that Tavares Construction Company, Inc., a corporation, Concrete Ship Constructors, a joint venture, Stroud-Seabrook, a copartnership, L. S. Stroud, R. S. Seabrook, C. M. Elliott, Carlos Tavares, Henry M. Page and Don F. Gates, some of the defendants in the above entitled action, filed their and the first notice of appeal from the judgment in the above entitled action to the United States Circuit Court of Appeals, Ninth Circuit, on August 26, 1947; and that said defendants filed their designation of portions of the record on appeal on September 3, 1947; and

It further appearing that pursuant to stipulation of the plaintiff and said defendants that the Court on September 12, 1947, ordered the time, for plaintiff to serve and file its designation of additional portions of the record on appeal extended to and including September 29, 1947; and [319]

It further appearing that the original time allowed by Rule 73(g) of the Federal Rules of Civil Procedure of 40 days from the filing of said notice of appeal on August 26, 1947, for the filing and docketing of said appeal in the appellate court will expire on October 5, 1947, thereby leaving only six days for the Clerk to prepare said record on appeal; and

It further appearing that due to the size of the record and the shortness of time for the preparation thereof by the Clerk, that additional time be provided for the preparation, filing and docketing of said record on appeal;

Now, Therefore, It Is Hereby Stipulated by and between plaintiff and said defendants, through their respective counsel of record, that the time for the filing and docketing of the record on appeal of said defendants may be extended thirty days, to wit, to and including November 4, 1947.

Dated this 15th day of September, 1947.

JAMES M. CARTER

United States Attorney

By Francis C. Whelan

Special Assistant to the Attorney General

Attorneys for Plaintiff United States of
America

JOHN M. MARTIN and

FRANK L. MARTIN, JR.

By Frank L. Martin, Jr.

Attorneys for Tavares Construction Company, Inc., a corporation, Concrete Ship Constructors, a joint venture, Stroud-Seabrook, a co-partnership, L. S. Stroud, R. S. Seabrook, C. M. Elliott, Carlos Tavares, Henry M. Page and Don F. Gates, Defendants [320]

ORDER EXTENDING TIME FOR FILING AND
DOCKETING OF RECORD ON APPEAL IN
APPELLATE COURT

Pursuant to the above and foregoing stipulation of the parties, and good cause appearing therefor;

It Is Hereby Ordered that, pursuant to Rule 73(g) of the Federal Rules of Civil Procedure, the time for defendants Tavares Construction Company, Inc., Concrete Ship Constructors, Stroud-Seabrook, L. S. Stroud, R. S. Seabrook, C. M. Elliott, Carlos Tavares, Henry M. Page and Don F. Gates, for filing the record on appeal and docketing the action in the appellate court, is hereby extended to and including November 4, 1947.

Dated this 16th day of September, 1947.

PAUL J. McCORMICK

United States District Court Judge

[Endorsed]: Filed Sep. 16, 1947. Edmund L. Smith,
Clerk. [321]

[Title of District Court and Cause]

STIPULATION EXTENDING TIME FOR FILING
RECORD AND DOCKETING APPEAL IN AP-
PELLATE COURT AND ORDER THEREON

It appearing that Tavares Construction Company, Inc., a corporation, Concrete Ship Constructors, a joint venture, Stroud-Seabrook, a copartnership, L. S. Stroud, R. S. Seabrook, C. M. Elliott, Carlos Tavares, Henry M. Page and Don F. Gates, some of the defendants in the above entitled action, filed their and the first notice of appeal from the judgment in the above entitled action to the United States Circuit Court of Appeals, Ninth Circuit, on August 26, 1947; and

It further appearing that pursuant to stipulation of the plaintiff and said defendants that the Court on September 16, 1947, ordered that the time for said defendants to file the record on appeal and docket the action in the Appellate Court be extended to and including November 4, 1947; and

It further appearing that John M. Martin, counsel for said defendants, who tried the above entitled action in the above entitled [322] Court is now absent from his office in Los Angeles, and has been continuously absent therefrom since about September 3, 1947, in connection with matters pending in other States and the District of Columbia, and that as a result thereof additional time is required to enable said counsel to prepare a statement

of the points on which he intends to rely on the appeal and to designate the parts of the record to be printed;

Now, Therefore, It Is Hereby Stipulated by and between plaintiff and said defendants, through their respective counsel of record, that the time for the filing and docketing of the record on appeal of said defendants may be extended an additional twenty days, to wit: to and including November 24, 1947.

Dated this 28th day of October, 1947.

JAMES M. CARTER

United States Attorney

By Joseph F. McPherson

Attorneys for Plaintiff United States of
America

JOHN M. MARTIN and

FRANK L. MARTIN, JR.

By Frank L. Martin, Jr.

Attorneys for Defendants Tavares Construction Company, Inc., a corporation, Concrete Ship Constructors, a joint venture, Stroud-Seabrook, a copartnership, L. S. Stroud, R. S. Seabrook, C. M. Elliott, Carlos Tavares, Henry M. Page and Don F. Gates [323]

ORDER EXTENDING TIME FOR FILING AND
DOCKETING OF RECORD ON APPEAL IN
APPELLATE COURT

Pursuant to the above and foregoing stipulation of the parties, and good cause appearing therefor;

It Is Hereby Ordered that, pursuant to Rule 73(g) of the Federal Rules of Civil Procedure, the time for defendants, Tavares Construction Company, Inc., Concrete Ship Constructors, Stroud-Seabrook, L. S. Stroud, R. S. Seabrook, C. M. Elliott, Carlos Tavares, Henry M. Page and Don F. Gates, for filing the record on appeal and docketing the action in the Appellate Court is hereby extended to and including November 24, 1947.

Dated this 28th day of October, 1947.

PAUL J. McCORMICK

United States District Court Judge

[Endorsed]: Filed Oct. 28, 1947. Edmund L. Smith,
Clerk. [324]

[Title of District Court and Cause]

NOTICE OF MOTION TO CORRECT AND
MODIFY RECORD AND JUDGMENT

To James M. Carter and Robert G. Berry, Attorneys for
Plaintiff:

Please take notice that on the 2nd day of December, 1947, at the hour of 10:00 o'clock A. M., or as soon thereafter as counsel can be heard, the attorneys for the defendants, Tavares Construction Company, Inc., a corporation, et al., will appear before His Honor, Judge Paul J. McCormick, in the room usually occupied by him as a court room, in the United States Court House at Los Angeles, California, and move the Court for the entry of an Order herein as follows:

1. Correcting, modifying and enlarging the record in such manner as to eliminate the ambiguity, uncertainty and confusion that now exists by reason of the fact that the provisions of Paragraph 10, at page 13, of the Judgment entered June 6th, 1947 are not in conformity with the views of the trial court as expressed elsewhere in the record. [325]

2. Directing the making of a supplemental record in conformity with the findings and decision of the Court upon this Motion.

3. Modifying the Judgment in such manner as to carry out and give effect to the views and decision of the trial court upon the hearing of this Motion.

The ambiguities and uncertainties which will form the basis of this Motion are set forth in detail in the supporting affidavit of John M. Martin served and filed herewith. The special portions of the record to which

counsel will direct the Court's attention and seek modification and enlargement are referred to and enumerated in said affidavit.

Said Motion will be based upon the record, files, pleadings, orders and supporting affidavit of John M. Martin served herewith.

Dated this 17th day of November, 1947.

JOHN M. MARTIN

FRANK L. MARTIN

Attorneys for Defendants Tavares Construction Company, Inc., a corporation, Concrete Ship Constructors, a joint venture, Stroud-Seabrook, a copartnership, Lloyd S. Stroud, R. S. Seabrook, C. M. Elliott, Carlos Tavares, Henry M. Page, and Don F. Gates

POINTS AND AUTHORITIES

Paragraph 14, page 14, of the Judgment dated June 6, 1947 by which the Court retains jurisdiction hereof for the purpose of making such further orders, judgments and decrees as may be necessary in the premises.

Federal Rules 60, 75(h) and 81(7)

Sec. 473 C. C. P. [326]

Received copy of the within Notice of Motion this 18 day of November, 1947. Joseph F. McPherson, Attorney for Pft.

[Endorsed]: Filed Nov. 18, 1947. Edmund L. Smith, Clerk. [327]

[Title of District Court and Cause]

AFFIDAVIT OF JOHN M. MARTIN IN SUPPORT
OF MOTION TO CORRECT AND MODIFY
RECORD

State of California

County of Los Angeles—ss.

John M. Martin, of lawful age, being first duly sworn,
states:

That as one of the attorneys of record for defendants, Tavares, et al., he was present in court and participated throughout the entire proceedings in the above entitled cause in the trial court. That in order to clarify the record and enable the Appellate Court to have before it everything that occurred that is material to either party, it is necessary that the present record, which only partially discloses what occurred in the District Court, be corrected, modified and enlarged so as to truly disclose all that occurred in the District Court.

That in order to eliminate any ambiguity, uncertainty or confusion as to what the trial court intended by finding at Paragraph 10, [328] page 13, of the Judgment that just compensation for the taking of the rights of these defendants was nothing and especially to eliminate the confusion that exists in the record due to Paragraph 10, page 13, of said Judgment not being in conformity with the views of the trial court as expressed elsewhere in the record, it is necessary for affiant to state the views of Judge Yankwich, who presided at the pretrial hearing

and signed the pretrial order, as set forth in said order dated February 5, 1947, as follows:

“ORDER UPON PRETRIAL

The Court, having considered upon pretrial the matters heretofore submitted on September 30, 1946, calling for the determination of the nature of the interest of Tavares Construction Company, Inc., involved in this proceeding, does now, after consideration of the record and the joint stipulation filed on September 27, 1946, and the additional memorandum filed on October 4, 1946 and the argument of counsel, determine:

(1) That the lease and option rights of Tavares Construction Company, Inc., granted under the ‘Agreement of Lease,’ dated December 27, 1941, and by the supplements thereto, have been taken and condemned by this action.

(2) That the defendant Tavares Construction Company, Inc., has a compensable interest in the property taken by this proceeding.

(3) That the facts are as set forth in the joint stipulation and joint memorandum of counsel above referred to and the Court’s written opinion filed herein on October 10, 1946.

Dated: This 5th day of February, 1947.

LEON R. YANKWICH

United States District Judge” [329]

It clearly appears from the record (Tr. p. 433) that Judge McCormick was of the opinion that defendants’ option rights should be determined by a separate action

in the United States Court of Claims. From statements made to Government counsel and affiant from the bench during the course of the trial, which statements were made in the absence of the jury, affiant is satisfied that at all times during the course of the trial, at the time of the signing of the Judgment, and at the time of denying Defendants' Motion for New Trial, Judge McCormick, as trial judge, believed this court in this proceeding was powerless to determine the question of compensation for cancellation or frustration of option rights of defendants attributable to the action of the agents of the Government. In confirmation of affiant's statement as aforesaid, the record does show (Tr. p. 433) that Judge McCormick stated in substance that the case could be simplified by preserving the option feature for a separate action in the United States Court of Claims. That Judge McCormick was still of the foregoing opinion at the time of the hearing of Defendants' Motion for New Trial is shown by the record (Tr. p. 77, line 19, of proceedings on motion for new trial) where Judge McCormick in substance said that except for Judge Yankwich's pretrial order, he would not have permitted the question of compensation as to these defendants to go to the jury, to decide.

Affiant further states that the views expressed by Judge McCormick as shown by the record (Tr. p. 400, line 20, to p. 405, line 3) where Judge McCormick stated that counsel for these defendants would not be permitted to discuss or talk about said defendants' right to sue in the United States Court of Claims for the recovery of damages for breach of their option contract, show that it was Judge McCormick's view and determination that while the physical property and right, title and interest of said

defendants in and to said property had been taken by this action, that the trial court was without power to adjudicate or determine the amount of compensation [330] due from plaintiff to said defendants by reason of the cancellation or frustration of their option.

Affiant further states that he is satisfied from the statements made by Judge McCormick during the course of the trial, that the trial court concluded that defendants' option rights were of substantial value and that the trial court only intended and understood its judgment herein to mean that inasumch as the trial court was without power to award compensation for frustrated option rights, that it was entering a judgment which only determined the issue of just compensation in so far as the trial court had the legal right to award compensation in this proceeding.

Affiant further states that from the statements of the court as aforesaid, affiant is satisfied that at the time the trial court signed the Judgment and at the time the trial court entered the Order denying Defendants' Motion for New Trial, the trial court entertained the views as herein-above set forth and did not intend to make or sign a judgment that would in any manner preclude these defendants from the maintaining of a separate action in the United States Court of Claims for the recovery of damages for breach of their option contract.

Affiant further states that he is satisfied from statements he heard the trial court make during the course of the trial, that the signing of the judgment herein in so far as it purports to state that just compensation for the taking of said option rights is nothing, was signed by the trial judge with the mind of preserving to the defendant optionees the right to litigate their claim in the United

States Court of Claims and that the court did not intend thereby to modify the views expressed during the trial.

That in order to eliminate ambiguity, uncertainty and confusion in the record as to what the court intended by the provisions of Paragraph 10, page 13, of the Judgment herein, it is necessary that the record herein be corrected and modified to the end that it [331] may truly and fully disclose what occurred in the District Court and that the Judgment herein be made definite by a finding that the court either has or is without power to award compensation in this proceeding for the taking, cancellation or frustration of defendants' option rights.

Affiant further states that from the facts as stated as aforesaid, affiant is satisfied that the trial court denied Defendants' Motion for New Trial because the trial court believed that said defendants were in the wrong forum and that said court was without power in this proceeding to award to said defendants, compensation for the cancellation or frustration of their option rights. Affiant is satisfied that the trial court believed that said defendants were entitled to equitable and substantial relief but that said relief could only be afforded by the United States Court of Claims.

That affiant did not learn that the record was incomplete and failed to show all that occurred in the District Court until a re-examination of the entire record was made under date of November 13, 1947 for the purpose of preparing the Record on Appeal.

That affiant acted with due diligence though the actual re-examination of the record was delayed for the reason

that affiant was necessarily absent from the State of California while engaged in working on other legal matters for the period of approximately two months.

That by the terms of Paragraph 14, page 14, of the Judgment this court retains jurisdiction hereof for the purpose of making such further orders, judgments and decrees as may be necessary in the premises. That in the interest of clarity, the record herein should either indicate:—

(a) that the trial court determined that it had power to award compensation for the cancellation or frustration of defendants' option contract; or

(b) that the trial court determined that it did not have power [332] to award compensation for the cancellation or frustration of defendants' option contract.

JOHN M. MARTIN

Subscribed and sworn to before me this 17th day of November, 1947.

(Seal)

ANNA M. ROSSER

Notary Public in and for the County of
Los Angeles, State of California [333]

Received copy of the within Affidavit of John M. Martin this 18 day of November, 1947. Joseph F. McPherson, Attorney for Pft.

[Endorsed]: Filed Nov. 18, 1947. Edmund L. Smith, Clerk. [334]

[Minutes: Tuesday, December 2, 1947]

Present: The Honorable Paul J. McCormick, District Judge.

For hearing motion of defendants Tavares Construction Co., Inc., et al., to correct and modify record and judgment; C. U. Landrum, Esq., Spec. Asst. to Att'y General, present for Gov't; John M. Martin and Frank L. Martin, Esqs., present for moving defendants;

Attorney John Martin argues in support of motion and Attorney Landrum argues in reply and in opposition to motion. Court makes a statement and notes correction in transcript of Feb. 20, 1947, (page 435, line 3).

At 11:23 A. M. Attorney John Martin argues further in support of motion in closing. Court makes a statement and reads from transcripts and record.

Court gives oral opinion and enters order that certain words are hereby stricken from judgment upon verdict entered June 7, 1947, in accordance with said opinion.

Attorney Landrum excepts to Court's ruling.

Attorney John Martin moves that transcript be made of these proceedings embodying Court's ruling, to be included in record on appeal, without necessity of preparing written order thereon, and it is so ordered over the objection of Attorney Landrum. [335]

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 324 contain full, true and correct copies of Complaint in Condemnation; Affidavit in Support of Order for Possession Under Second War Powers Act; Order for Possession Under Second War Powers Act; Order Amending Complaint; Amendment to Complaint in Condemnation; Order for Immediate Possession; Declaration of Taking No. 1; Decree on Declaration of Taking No. 1; Demand for Trial by Jury; Amended Declaration of Taking; Decree on Amended Declaration of Taking; Amended and Supplemental Complaint in Condemnation; Motion for More Definite Statement or for Bill of Particulars; Minute Order Entered March 26, 1945; Bill of Particulars; Answer to Amended and Supplemental Complaint in Condemnation and Counter-Claim and Cross-Claim of Defendants Tavares Construction Company, Inc., et al.; Order dated September 24, 1946; Stipulation and Agreed Statement of Facts in Support of Joint Motion of Counsel for Plaintiff and the Defendants, Tavares Construction Company, Inc., et al., Relative to Submission of this Case as to Said Defendants as Upon Pre-Trial; Joint Memorandum of Counsel on Pre-Trial; Ruling on Pre-Trial Hearing as to the Interest of Tavares Construction Company, Inc.; Order Upon Pre-Trial; Verdict; Judgment upon the Verdict; Motion for New

Trial; Affidavits of John M. Martin and Frank L. Martin in Support of Motion for New Trial; Order Denying Motion for a New Trial; Notice of Appeal; Bond on Appeal; Designation of Portions of Record on Appeal etc.; Order for Transmission of Original Exhibits etc.; Stipulation and Order Extending Time for Appellee to File Additional Designation of Record; Plaintiff's Designation of Additional Portions of Record etc.; Two Stipulations and Orders Extending Time for Filing Record and Docketing Appeal; Notice of Motion to Correct and Modify Record and Judgment; Affidavit of John M. Martin in Support of Motion to Correct and Modify Record; Minute Order Entered December 2, 1947, and Defendants' and Appellants' Supplemental Designation of Record on Appeal, which together with Original Plaintiff's Exhibits 1 to 5, inclusive, and Original Defendants' Exhibits F to J, inclusive, and Q to W, inclusive, and original reporter's transcript of proceedings on February 17 to 21, inclusive, 24 to 27, inclusive, 1947, June 6, 1947, and December 2, 1947, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$74.10, which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 17th day of December, A. D. 1947.

(Seal)

EDMUND L. SMITH

Clerk

By Theodore Hocke

Chief Deputy Clerk

[Title of District Court and Cause]

Honorable Paul J. McCormick, Judge Presiding

REPORTER'S TRANSCRIPT OF PROCEEDINGS

San Diego, California, Monday, February 17, 1947

Appearances:

For the Plaintiff: James M. Carter, United States Attorney, by C. U. Landrum, Special Assistant to the Attorney General; and Francis C. Whelan, Special Assistant to the Attorney General; and Robert G. Berrey, Special Attorney, Lands Division.

For Defendants, Tavares Construction Company, Inc., a corporation, Concrete Ship Constructors, a joint venture, Stroud-Seabrook, a copartnership, Lloyd S. Stroud, R. S. Seabrook, C. M. Elliott, Carlos Tavares, Henry M. Page, and Don F. Gates: John M. Martin, Esq., Charles C. Crouch, Esq., and Frank L. Martin, Jr., Esq.

For the Defendant, City of National City: C. M. Monroe, Esq., Edwin M. Campbell, Esq., Jean Daze Ratelle, Esq., and Merideth L. Campbell, Esq.

For the Defendants, Carl Johnson and Pearl Johnson; Hunter M. Muir, Esq.

For the County of San Diego: Duane J. Carnes, Esq., Deputy District Attorney.

For the Defendant, San Francisco Bridge Company: Harrison G. Sloane, Esq.

For the Defendant, State of California: L. G. Campbell, Deputy Attorney General; and J. F. Hassler, Deputy Attorney General.

San Diego, California, Monday, February 17, 1947.

10:00 A. M.

The Clerk: Case 248-Civil, United States v. Land, etc.

The Court: Note Your appearances, gentlemen.

Mr. Ratelle: My name is Jean Ratelle. I am appearing on behalf of National City and will be associated with Meredith Campbell and Edwin Campbell and Cyrus Monroe.

The Court: Gentlemen, if you will call your names and speak loud enough so that the reporter can hear you.

Mr. Edwin Campbell: Edwin Campbell for National City.

Mr. Muir: Hunter M. Muir appearing for Carl A. Johnson and Pearl Johnson, defendants.

Mr. Edwin Campbell: I will introduce Mr. Monroe. He will be associated with us representing National City as chief counsel.

Mr. John M. Martin: John M. Martin speaking. Mr. Charles C. Crouch, Frank L. Martin and I appear for the Concrete Ship Constructors and the respective individuals named as co-defendants interested as joint ventures.

The Court: And appearing specially for Tavares Construction Company?

Mr. John M. Martin: Yes. Tavares Construction Company is also one of the joint ventures, and I am trying to include them without mentioning specifically all of the parties.

The Court: Yes. [3*]

Mr. Carnes: Duane J. Carnes appearing for the County of San Diego.

Mr. Sloane: Harrison G. Sloane appearing for San Francisco Bridge Company.

The Court: Any further appearances for any defendants?

Mr. Ratelle: I have noted my name for the record, your Honor; Jean Ratelle for National City.

Mr. Campbell: L. G. Campbell and Mr. J. F. Hassler for the State of California.

The Court: Gentlemen, I will have to ask you again to speak louder so that the reporter can hear you.

Mr. Campbell: L. G. Campbell and J. F. Hassler for the State of California.

The Clerk: And Mr. Monroe, what are the initials, please?

Mr. Monroe: C. M.

The Court: Mr. Campbell and Mr. Hassler are assistant attorneys general?

Mr. L. G. Campbell: Deputies, sir, yes, sir.

The Court: And is the District Attorney of the County of San Diego represented?

Mr. Carnes: Yes, Carnes, deputy district attorney.

The Court: Are there any other defendants appearing in the case?

(No response.) [4]

The Court: Proceed. Where are the government counsel?

Mr. Berrey: Mr. Landrum is on the telephone. He will be here in a few moments, your Honor.

The Court: The case was called for 10:00 o'clock.

Mr. C. M. Monroe: Might I make an inquiry, your Honor?

The Court: Be seated, please, gentlemen, in the bar.

Mr. C. M. Monroe: Something was said to the effect that before we started the actual introduction of evidence there would be discussed some of the questions that will have to be determined ultimately. Was that in accordance with your Honor's understanding?

The Court: The record now shows that government counsel are now in court, Mr. Landrum and Mr. Whelan appearing.

That is correct, Mr. Monroe. I think we had better empanel the jury and then excuse them.

Mr. Monroe: That will be satisfactory, your Honor.

The Court: So as to save the citizens their time.

Mr. Monroe: Yes.

Mr. Martin: May I ask, your Honor please, whether it is intended to excuse the jury for the rest of the day?

The Court: I think so. I think we will excuse them until tomorrow morning.

Mr. John M. Martin: I ask that so that I may instruct my witnesses when they are to be here.

The Court: Yes, I think it will take us the rest of the [5] day with our discussions.

Mr. Crouch, I will have to ask you to leave that position for the government for the time being and to sit over on this side. You, gentlemen, were to be here at 10:00 o'clock and not five minutes after. Call the jurors.

(A jury was duly empaneled and sworn.) [6]

The Court: Ladies and gentlemen, we will take a recess in this case, so far as you are concerned, until tomorrow morning. Gentlemen, I am going to convene at 9:30 instead of 10:00 during the trial of this case. During this recess, ladies and gentlemen, and whenever you separate from one another in the jury box during the trial, you will remember these terms of the admonition

which will now be given by the court. Keep these terms inviolate and, if there be any effort on the part of any person to cause you to commit a violation of the terms of this admonition, you will find out who that person is, without carrying on any conversation or having any contact with him or her, and report his or her identity to the court, and not have any contact or further association with that person, if there be any. During such time do not talk about the case, nor permit any person to speak to you or in your presence concerning the case, and do not form or express any opinion concerning this case until it is finally submitted to you. Be here in the morning at 9:30, ladies and gentlemen, and you may be excused until that time. All other jurors will be excused until they are notified when to appear. I will ask the other jurors, if there are any, to leave the court room during this discussion.

I believe there is one motion here with respect to one of the defendants.

Mr. Berrey: Our motion, your Honor, is with respect to [7] the answer of Carl and Pearl Johnson, defendants, who are the owners of Parcel 9. We move to strike from the answer paragraphs 3, 4, 5, 6, 7, 9, and a portion of the prayer.

Paragraph 3 of the answer alleges that, during the months of April and May of 1942, the defendants had leased a portion of the real property, Parcel 9, to one Carl G. Bliss, at a rental of \$100 per month, and so forth. It is further alleged that the lease was rescinded at the request of Tavares Construction Company.

Paragraph 4 alleges a lease that was in effect at the time of the institution of this action.

Paragraph 5 also alleges a lease that was in effect at the time of the institution of this action.

Paragraph 6 alleges the loss that would be payable to the defendants under the two leases which were in effect at the time of the institution of this action.

Paragraph 7 alleges that the defendants were deprived of these rentals by reason of the institution of this action and the order of possession that was made.

In paragraph 8 the defendants allege that the sum of \$8,000 is the reasonable sum to be allowed defendants as compensation for the fee to their real property herein being acquired by plaintiff.

Paragraph 9 alleges that the sum of \$4,125 is a reasonable sum to be allowed defendants by reason of the loss of [8] the rentals.

The portion of the prayer which is included in our motion, that part included in line 5, is the words "together with lawful interest, from November 10, 1942, and together with the sum of \$4,125 for the loss of rentals under the leases hereinabove described and alleged." It is our contention that the defendants are entitled to only just compensation, which is the fair market value of their interest on the date of taking, which they have alleged to be \$8,000; that they are entitled to that and no more. They are attempting, by paragraph 9, to recover for the loss of rents which they would have received if they had retained the fee title to their property. That is not compensable.

Our ground for moving to strike the paragraph setting up the various leases is that they are evidentiary in nature and, therefore, that they are irrelevant and redundant and are subject to being stricken from the answer.

That is all, your Honor. We have cited in our points and authorities general citations to the effect that irrelevant and redundant matter may be stricken. We have

cited the fact that just compensation is the fair market value of the property at the time of taking. And as to the part with reference to the prayer for interest, the defendant is entitled to interest only from the date that the government acquired possession to the time it filed its declaration and deposited [9] the money, and is only entitled to interest subsequent to the filing of the declaration of taking on any excess over the amount deposited in the registry of the court; that it is not entitled to interest from the original date the government went into possession until the payment of the judgment. [10]

The Court: Mr. Muir.

Mr. Muir: I believe that correctly states the law in respect to the leases that were pleaded. I think, though, in regard to the matter of interest they desire to strike out entirely the value plus lawful interest. I believe it should be that we are entitled to the value plus interest on the amount in excess of the amount declared and deposited in court by the government at the time of their taking. I think that the prayer for the value plus lawful interest should stand.

The Court: You mean the value of the fee?

Mr. Muir: The value of the fee, yes, your Honor.

The Court: These allegations of leasehold interest or of the value of the use it seems to me would be merged in the value of the fee at the time of the taking,—

Mr. Muir: Yes, sir.

The Court: —and it would not be proper to plead them. That would be proper evidence to show the value of the fee probably.

I think you are correct that with the exception of the inclusion of the prayer for interest as to the difference between the amount deposited and the value of the use,

that that portion of the prayer should be stricken. I don't know as it makes any difference because the law is clear as to the measure of just compensation in cases of this kind, but I think the allegation of these leasehold interests in the [11] pleadings is irrelevant and redundant and should go out. The motion will be granted to that extent and denied as to the extent in toto with respect to interest.

The court will take a recess, gentlemen, for just a few minutes.

(A short recess was taken.) [12]

The Court: I thought, gentlemen, there were some matters which should be perhaps a little more thoroughly discussed and considered, before we proceed with the introduction of evidence, as to some of the interests that are involved in the case, not as to all. As to some, it is just a simple problem of ascertaining the just compensation on the basis of the fair market value. There are some features with respect to the Tavares interests and the interests of National City—

Mr. Crouch: I am sorry, your Honor; there is so much noise I can't hear you.

The Court: That is the reason I have raised my voice. We have had considerable difficulty here for a long time and I will ask you gentlemen to raise your voices.

Mr. John L. Martin: Is there any objection to my sitting in the jury box a while, your Honor, while your Honor is talking?

The Court: No, not at all. I hope none of you are so diffident that you will not announce what you have to say to the court. Some of you seem to have that fault. We have constant interruptions because of the activities

in the air here, a situation we have had here for the last 10 years.

I have indicated to you generally what is in the court's mind, without stating it with particularity. There is, of course, the question suggested by the government as to whether the so-called unit rule is the rule that should be [13] adopted or whether there should be some variation from that rule on account of the interests that are alleged by the Tavares Construction Company with respect to these agreements, and the amendments, declarations of taking and amended declarations of taking.

I presume that you are agreeable on the time.

Mr. Landrum: Does your Honor mean that we are agreeable on the question of the date of taking and the date of the valuation?

The Court: Yes.

Mr. Landrum: I would like to discuss with your Honor that point when we come to it, and I think we may arrive at some agreement here by which we can save a lot of time in the trial of this case. And, if your Honor will permit me to discuss it with you for just a moment, I would like to tell you what the case really is, and possibly these gentlemen and I may be able to agree on it.

The Court: I was under the impression that you would be able to agree on it.

Mr. Landrum: Would your Honor hear me? [14]

Mr. Landrum: If the court please, I think we are all agreed on the proposition that the date of valuation is the date of the first disturbance of the ownership or the use of this property by the United States, providing there has been no declaration of taking filed or no order of possession.

Now, in this case, as I understand it, on the 10th day of November, 1942 the petition in condemnation was filed and an order was made by this court giving the government of the United States possession of all of those parcels with which we are here concerned numbered 1 to 11, inclusive. Parcel A was not at this time in this condemnation proceeding. On the 23rd day of December, 1944 the amended petition in condemnation, together with an amended declaration of taking, was filed. In so far as the Tavares Construction Company's claim here is concerned, we have agreed that the date of December 23, 1944 is the date of the taking of their so-called lease, coupled with an option.

Mr. John M. Martin: That may be so stipulated, your Honor, on behalf of my client.

Mr. Landrum: I desire also at this time to say, your Honor, that since my arrival here and my study of this matter, I have found there have been three settlements made.

Parcel 4 is no longer in this case, as to the Santa Fe Railway, except in so far as it may be covered by the Tavares Construction Company's claim. In other words, the [15] land owner in parcel 4, I believe, was the Santa Fe Railway Company. That has been settled; the fee owner is out. Parcel 10, which I also believe was owned by the Santa Fe Railway Company, has been settled and is out. Also parcel 11. Those are out.

Now, the government is perfectly willing to concede at any time and in any case that the moment that we disturb the possession of a landowner, that is the date of the valuation of his property, but he is not entitled to claim any improvements or anything which the government may have made on that property after the date of the dis-

turbance, even though we did not file a declaration until several days ago. That is decided in the Miller case in 317 U. S. I am sure your Honor is familiar with that. So if they will concede with me that the date of valuation of their interest is the first date that the government came in and attempted in any way to interfere with them, or if the government had not touched the land, what is the date of the order in this court for possession of the land. That would be it. If there is neither any disturbance nor possession, nor any order of possession, then when was your declaration of taking filed? It is that date.

Now, if your Honor please, as we understand the situation, and if I may say to the court I am probably under a little handicap here, and I trust if your Honor notices any [16] transgression of mine in connection with some of your Honor's rules, I want you to know that I will attempt to comply with them.

I have prepared this in the form of a memorandum and when I am through, I would like to present it to your Honor.

The Court: I have received from all of you a pre-trial memorandum. I assumed you were all familiar with the rules of court with respect to a pre-trial memorandum, and I have received your pre-trial memorandum. I assumed it was served on other counsel.

Mr. Landrum: It was, your Honor, but I have gone a little farther here to this extent, going back to the question of when did the government first interfere.

I find on December 19, 1941 with respect to parcel 1 a small hole was dug with a drag line on this property. I am going to hand this to your Honor later, if you will permit me.

As to parcel 2, that is owned by the City of National City. Actual possession was taken in September 7, 1942, but there was no physical disturbance on parcel 2.

On parcel 3 actual possession was taken on September 7, 1942, but there was no actual disturbance with that possession.

Parcel 7—I don't know whether I gave that to you—that is the same situation. On September 7, 1942, under an order of the commanding officer, or whoever it was down at [17] Tavares Construction Company, possession was taken of parcel 7, but they did not disturb it.

Now, as to parcel 9, that is the Johnson people, Carl and Pearl Johnson, on June 5, 1942 actual possession was taken.

As to parcel A, which is owned by the City of National City, and which was brought into this law suit on the 23rd day of December, 1944 by virtue of a declaration of taking, the truth of the matter, according to our records, your Honor, is that on April 1, 1942 the Tavares Construction Company, under and by virtue of its arrangements, went on that property and began extensive dredging operations.

So from that standpoint on parcel 5, 6 and 8, all owned by the City of National City, there was no disturbance and no possession, nothing of any kind until December 1, 1942. That is later than November 10, 1942, which is the date of the order of this court giving the government possession.

Now, as to parcels 1, 2, 3, 7 and 9, the valuation date should be on the basis of actual disturbance and should be earlier than November 10th. But as to parcels 5, 6 and 8, when it comes to the question of the government

or Tavares actually disturbing these people, it was not done until after November 10th.

So the ownership of four parcels here of the City of National City having been disturbed and interfered with prior to November 10, 1942 and three parcels owned by the City of [18] National City not having been, the government respectfully tenders to the City of National City, in order to avoid confusion in the trial of this law suit, a stipulation to the effect that November 10, 1942 be fixed as the date of the valuation of the fee title of those parcels of the City of National City, and we make the same offer to Carl and Pearl Johnson.

Now, if we do not do that, your Honor, we are going to have a great deal of confusion in the trial of this case. It is true that, as a strict matter of law and I frankly concede it, the defendants are entitled to have the date of valuation fixed as the date we disturbed it, when you have five, six or seven dates with nine or ten parcels of land, and we undertake to ask a witness, "What is your opinion on June 5th? What is your opinion on September 7th? What is your opinion on April 1st?" It will be confusing, and for the purposes of clarity the government tenders that stipulation to the City of National City. They will be hurt slightly on four parcels, and helped slightly in three parcels.

Now, with relation to parcel A, parcel A was only brought into this law suit by virtue of the amended declaration of taking, which was filed on the 23rd day of December, 1944. It, therefore, is in a different situation from the other parcels. From our records, there was actually extensive dredging started on parcel A on the first day of April, 1942, [19] and regardless of the fact that it wasn't even in the law suit then, we tender a

stipulation to the City of National City that as to parcel A it may be April 1, 1942. I want it definitely understood, however, that the government does not concede that by making such a stipulation they would be entitled to claim the benefit of hundreds of thousands of dollars of improvements which were placed on there after that time. Now, if your Honor please, if your Honor does not wish this—

The Court: Have you served it on counsel?

Mr. Landrum: I will be very glad to give the other gentlemen copies of it.

The Court: Have you seen this?

Mr. John M. Martin: No. I assume it is offered as a tender of stipulation solely as to the landowners.

Mr. Landrum: It does not affect your argument.

Mr. John M. Martin: And it is understood we have stipulated as to the 23rd of September, 1944 as to the clients I represent.

Mr. Landrum: That is correct.

Mr. John M. Martin: So I am not primarily concerned with this.

Mr. Monroe: May I be heard, your Honor?

The Court: Certainly.

Mr. Monroe: Now, if your Honor please, I do not believe [20] that it is quite as simple as counsel has suggested. To start with, this land, as far as the land of National City is concerned, is tideland. It is land that is set apart originally under the Constitution of California as being public lands dedicated to the uses of the people of the State for commercial navigation and fishery and by the constitutional provisions the alienation of that land is forbidden; that is, the alienation to private parties.

In 1923 by special statute the State conveyed the property to National City. I think we should have before us that statute. It is in the Acts of 1923, at page 81, chapter 46 of that Act, and it provides:

“There is hereby granted and conveyed to the City of National City, in the county of San Diego, State of California, all of the lands situate on the city of National City side of said bay, lying and being between the line of mean high tide and the pier head line in said bay, as the same has been or may hereafter be established by the federal government, and between the prolongation into the bay of San Diego, to the pier head line of the boundary line between the city of National City and the city of San Diego, and the prolongation into the bay of San Diego to the pier head line of the northerly line of the street commonly known as Thirtieth [21] street, same being the southerly boundary of the city of National City, California.” [22]

“Sec. 2. The city of National City shall have and there is hereby granted to it the right to make upon said premises all improvements, betterments and structures of every kind and character, proper, needful and useful for the development of commerce, navigation and fishing, including the construction of all wharves, docks, piers, slips, and construction of and operation of a municipal belt line railroad in connection with said dock system.

“Sec. 3. No grant, conveyance or transfer of any character shall ever be made by the city of National City of the lands described in Section One, or of any part thereof, but the said city shall continue to hold

said lands and the whole thereof unless the same revert or be receded to the state of California. The harbor of National City shall remain always a public harbor and the said city shall never charge or permit to be charged on any of the premises by this act conveyed any unreasonable rate or toll, nor make nor suffer to be made any unreasonable charge, burden or discrimination. In the event of a violation of any of the provisions of this act, the said lands and the whole thereof shall revert to the state of California."

Then, by sections 4 and 5, there is given to National City the right to lease these lands for the purposes enumerated and to collect the rentals. It provides for a term not to exceed 25 years of any lease. However, in about 1925, [23] the act was amended, increasing that term, in sections 4 and 5, to the term of 50 years.

Section 6 provides: "The state hereby reserves unto itself at all times the reasonable use of and access to all wharves, docks, piers, slips and quays hereafter constructed under the provisions of this act, for any vessel or water craft owned, leased or operated by the state."

In addition, as to the meaning of that type of conveyance, I do not know whether there will be any serious contention about it but in the case of *City of Long Beach v. Marshall*, decided by the Supreme Court of California in July, 1938, and reported in 11 Cal. (2d) at page 609, they have held, as to the tidelands under the act conveying to Long Beach, which is, for our purposes, at least practically identical, that what the City of Long Beach has is a fee, and that the reservations of title which are made, similar reservations, are not inconsistent with that fee. but there is, on behalf of the government, added onto the

fee or carved out of the fee, if you please, a right of reservation in certain instances.

That, of course, is important in that it is our contention that what the city of National City is entitled to receive is compensation for the fee less only such right as the State of California may have, or the value of such right.

But I think it goes quite a bit farther with regard to [24] the time of taking, the time when title vests, and the time when the value of this property shall be fixed.

There is, if your Honor please, involved here a most unusual state of facts, not at all what we have in the ordinary condemnation suit. Ordinarily, we come in and it is a question of the property that is taken and what is the property worth but here we have tidelands which are themselves public property, vested with a rather high type of public use, that have been taken both from the city and from the state. Of course, no argument is needed for the proposition that the tidelands of the city, those lands which constitute the waterfront and which serve as its access to the bay, do, necessarily, have a highly public character.

To get back to this particular action, the action was started in November, 1942, and the city of National City and the State and the Tavares Construction Company and the Concrete Ship, and so forth, as I understand it, were made parties to the action. There was no declaration of taking and there was no deposit of money at that time. The declaration of taking wasn't made until two years later.

At the time there was filed, on behalf of the government, an affidavit in support of the order for possession under the Second War Powers Act.

Do you want me to proceed or do you want to wait until after lunch? [25]

The Court: Probably it would be better to suspend at this time. I think we had better meet at 1:30 today.

Mr. Monroe: That is all right; that is very agreeable.

(Thereupon, at 12:00 o'clock noon, a recess was taken to 1:30 o'clock p. m., of the same date.) [26]

San Diego, California, Monday, February 17, 1947.

1:50 P. M.

The Court: Mr. Monroe, I think you may proceed with your argument.

Mr. Carnes: Your Honor, there is a stipulation which has been arrived at, which satisfies the claim of the County. Mr. Muir, and the government, and I agreed to stipulate that the County tax demands against parcel 9 in the sum of \$45.99 are a proper demand and may be paid from the award.

The Court: Is that correct, gentlemen?

Mr. Berrey: That is correct, your Honor.

Mr. Muir: I hesitate to state about deducting it from the award, as a part of the stipulation.

The Court: Yes, perhaps that is for the court later. I think the matter of the apportionment of the award is a matter for the jury.

Mr. Muir: We will stipulate to the amount of the lien, your Honor.

The Court: It is so understood. Then as to that parcel the County of San Diego is not required to appear before the jury, I take it?

Mr. Carnes: That is the only matter we have, your Honor.

Mr. L. G. Campbell: With the permission of the court and counsel, I would like to speak just a few moments about [27] the position of the State of California in the case.

The Act that counsel has referred to was passed in 1925, and by it there was the grant to the City of National City. Under the holding that counsel referred to, *Long Beach v. Marshall*, the fee title passes to the grantee. We have no quarrel with that law of the State of California. In the Act that counsel referred to, in 1923, there was reserved the right in the State to use the piers, water, quays and equipment about the tidelands there. There was that reservation for use by the State.

At the time the answer was prepared setting that up, it was my belief, and I dictated the answer, that there were several craft, several ships, that the State used in training, and so on. As it turns out, and as I am reliably informed by the Department, there is but one ship, and that perhaps would be useful only in training while at anchor. I make this statement to lead up to the expression that we have no evidence to offer, and that we do think if the court enters a nominal judgment of \$1.00 in favor of the State, that it is all that we can reasonably ask the court to enter. [28]

Now, there is something else. The case has many angles and I know Mr. Hassler, of our office, has studied the matter of the dealings involved, as set forth in the pleadings and statements, and I would like if your Honor would hear Mr. Hassler on that particular feature briefly. And then, if I may, or if we may both be excused from court, we will perhaps return this afternoon.

But I wanted to make it clear to the court that we are not taking up the time of the court in claims for damages under the reservation of the 1925 act, or 1923 act—

The Court: The 1925 act, the one that Mr. Monroe referred to this morning.

Mr. Monroe: Yes, sir.

The Court: Is the court to understand that the conceded compensation of \$1.00 for the State's interest will dispose of all of the issues as to the State of California?

Mr. L. G. Campbell: I would say in that connection that I had the engineers of the State make a plat and, according to their plat, the area covered pursuant to the act of the State Legislature to National City is extensive enough to include all of the lands, all of the tidelands, that the federal government now is seeking to condemn.

The Court: Of course, we are glad to hear from Mr. Hassler. But what further light would he throw on the State's position? [29]

Mr. L. G. Campbell: On that particular point, Mr. Hassler will throw no light, as I understand him, but on the matter of the option involved we felt that perhaps the precedent that might be established is one that should be brought to the attention of the court, and it is with that in view that I am suggesting that Mr. Hassler be heard, because he has studied the point.

The Court: Probably we had better hear from Mr. Hassler, then.

Mr. Monroe: That is agreeable.

The Court: Very well, Mr. Hassler.

Mr. Hassler: May it please the court, Mr. Campbell has stated the only compensable interest of the State is very nominal, and we will stipulate, I believe, to a judgment on that basis.

There appears, however, another question which affects the State policywise, on which we would like to be heard, and we don't see how a question like this can be raised at all if it can't be raised as a friend of the court or as I am trying to do it now. The Tavares Company, according to the document included in the memorandum submitted by the attorney for the plaintiff, entered into a contract in December of 1941, and that contract provided, in Section 15, paragraph 15, upon the expiration of the contract for any of certain assigned reasons or causes the Tavares Company would have an [30] option within a certain time to purchase, among other things, the site upon which the present or the subsequent activity was located. As I understand the facts, no condemnation had been filed at that time. This was in December, 1941. On November 10, 1942, a condemnation action was filed and, on November 11th, the day following, an agreement was entered into providing, in effect, that, when title is acquired, the Tavares Company, as the lessee, shall have the right to purchase, and we think it further amplifies the way in which payments shall be made. The original agreement did not state how payment for the site shall be made. It was a method of payment for the machinery and facilities.

As I look at this agreement, it seems to me it is a preconceived notion to take the property of the State and, before any taking is really had, to give it or the court to give it or to covenant to give it to a private party. And I would like to read the applicable provision of the constitution, which is this: "Article 15. Section 3. All tidelands within two miles of any incorporated city or town in this State and fronting on the waters of any harbor, estuary, bay or inlet, used for the purpose of

navigation, shall be withheld from grant or sale to private persons, partnerships or corporations.”

Your Honor, we take the position that neither the federal government nor any instrumentality, the Defense Plant Corpora- [31] tion or anybody else, can take away waterfront property. And, as I say, the State in this particular instance has a very small residual interest; that it cannot take waterfront which the people of the State cannot pass to private ownership and covenant to sell it to somebody before it is even acquired.

We have no quarrel whatsoever with the position that the government can acquire a site, feeling that it will build a building on it, and then changing its mind and then selling the property to a private individual. But it is going back beyond that and doing that which we say cannot be done. It is taking public property for private use, and public property which is definitely set apart and reserved by the constitution. We feel it would be very bad if the federal government would get the idea this can be done and the only reason we bring up our point now is that no consolation or direction can be gained from what has been done in this case. Of course, if my argument is valid, I suppose this goes to the jurisdiction of the taking. All I can suggest, if the court would like to have a brief filed on that particular point, we will be glad to submit one, as a friend of the court, our interest being all taken care of.

The Court: Wasn't there a provision in that Act of 1925 similar to that referred to in the Long Beach case, referred to in the Banning case earlier at Wilmington, that there should be no vesting in any private interest of the tideland? [32]

Mr. Monroe: Yes; I think so.

Mr. Hassler: The difficulty is this and the reason I say we have to raise this point at this time is that neither our constitution nor any statutory law that I am familiar with prohibits the Tavares people, if they can take it properly from the government, from doing so. The constitution says there shall be no grant or sale but doesn't say, as in the alien Japanese land cases, that the person himself is disqualified. So, if we can't suppress the activity at this stage, we can't do it at all unless we enact legislation which would impair the obligations of these contracts.

The Court: There is a very interesting question there but I think probably at this time it becomes necessary to hear from you later on. If so, I will give the State an opportunity to be heard.

Mr. Hassler: Your Honor, as I understand it now, do you want a brief at this time?

The Court: Not now. You might prepare a brief and later on I will give you time, if you desire, to present it. I don't know that it will be necessary to consider that question, inasmuch as the State is now out of the picture as far as compensable interest is concerned. [33]

Mr. John M. Martin: If the court please, if counsel is to prepare a brief, may I suggest for his consideration and the court's that, as I see it, the position of the State and what it is now worrying about is no longer here involved because of the taking by the government of the lease and contract rights and option from the Tavares Company. We are not any longer confronted with such a situation as Mr. Hassler is apparently concerned with.

The Court: The court has indicated what it desires to indicate at this time.

Mr. Hassler: Thank you, your Honor.

Mr. John M. Martin: Thank you, your Honor.

Mr. L. G. Campbell: If the court please, may we then be excused from further attendance?

The Court: Yes, you may both be excused from further attendance. If we desire to call you here, we shall notify you.

Mr. Monroe: Shall I proceed, your Honor?

The Court: Proceed.

Mr. Monroe: If your Honor please, what has just transpired I think is of considerable importance to what we were about to discuss at the noon adjournment, and I mean from the standpoint of when shall this valuation—when shall this land be valued?

I was about to call attention to the affidavit in support [34] of the order for possession, which was filed on November 10, 1942, and which is a part of the files of this case. After describing the property, it is stated in the affidavit:

“That the possession of the said real property which is herein prayed is requested for the use of Tavares Construction Company, Inc. in furtherance of shipbuilding construction and activities of said Tavares Construction Company, Inc. and the United States Maritime Commission; that immediate possession of the real property designated as Parcels 1, 2, 3, 6, 7, 8, 9, 10 and 11, which said parcels are occupied by the said Tavares Construction Company, Inc., either by lease from the City of National City or other persons, or by the permission and consent of the owners or lessees thereof, is necessary and imperative; that the use to be made by plaintiff and the said Tavares Construction Company, Inc. of Parcels 4 and 5 will require the removal and reloca-

tion of the railroad tracks hereinbefore referred to, and plaintiff prays for an order of this Court for the possession of the said Parcels 4 and 5 upon the expiration of thirty (30) days from the making of an order by this Court for the possession thereof." [35]

An order for the possession was accordingly entered. That was on November 10th. As counsel has called to your Honor's attention, on the following day, on November 11th, a contract was entered into or an amendment to the contract with the Tavares Construction Company, by which there was granted to the Tavares Construction Company the option to purchase, which is one of the things that that company now seeks to be compensated for.

As I have stated, there was no declaration of taking at that time, nor did the government deposit its money for the property. As I understand the provisions of the statute, the title passes when the government deposits its money, and there is a declaration of taking filed.

The Court: May I interrupt you there a moment to give you the mind of the court on that?

Mr. Monroe: Yes.

The Court: I think there has been some little modification of that principle under the Second War Powers Act. I believe that it provides the government may pledge its credit.

Mr. Monroe: That is correct; it may. Under that Act, as I understand it, it may follow the procedure and ask for immediate possession without putting up the money. The point that I make, however, is this, your

Honor, that up until 1944, two years later, the government could have [36] dismissed the suit at any time.

Now, as a matter of fact in 1944 there was a motion on the part of National City to dismiss the suit, and the suit was dismissed as to National City. That dismissal, however, later was set aside.

The Court: That was the dismissal entered by Judge Ling?

Mr. Monroe: That is correct. I have here a reporter's transcript of the proceedings, and this I think becomes of tremendous importance in trying to figure out when we should consider the taking for the purpose of valuation. At the time of the discussion before the court of the motion to dismiss, there was presented and read into the record a letter from the chief counsel of the Maritime Commission to the local United States District Attorney, and it says this:

"The United States Maritime Commission has informally advised the Department that it is no longer interested in the land except to the extent that it retains possession a sufficient length of time to remove any facilities it has on the land. The Navy Department, however, is considering taking over the project, but, if it does decide to do so, will not be in a position to complete the administrative matters connected with the acquisition so as to have a declaration of taking available until sometime immediately after October 1, 1944." [37]

Now, what has followed is this: On October 3rd the declaration of taking was filed. There was then filed, or shortly after that, an amended complaint. But I find nothing in the complaint to indicate any explanation of what was going on, except that it refers to the fact that

a declaration of taking has been filed and that the government has now deposited in the registry of the court what it considered as just compensation. But this much at that point becomes plain. Somewhere along the line the original purpose of the taking or the original purpose for which the condemnation action was brought was abandoned, and some place along the line the government decided that they need this piece of land, not for the purpose of permitting Mr. Tavares and his company and associates to build concrete ships on it, but for the purpose of establishing a navy yard.

Now, it seems to me that we are confronted much by the same proposition as we are ordinarily confronted with when there has been a complaint filed and a cause of action set up, and later there is an amended complaint setting up a new and different cause of action, at which time you decide that the commencement of the new cause of action thus set up is from the time of the amendment of the complaint.

Now, frankly, I have not been able to find any decisions squarely in point. I do not find any cases in which the government started out to condemn a piece of property for [38] one public purpose, and then later changed its mind and in the same action decided to carry out the same condemnation for another and different public purpose. I think that perhaps the fact that there has been involved here a different public purpose will go far to answer the suggestion that has just been made on behalf of the State of California, and that is this, that as originally outlined or as originally indicated by the affidavit filed by the government, the taking or the proposed taking when this action was commenced in 1942 was for the purpose of having the property available so that they could sell it to Tavares as a part of their agreement with him.

The City of National City, just like the State of California, questions, and seriously, the right to take property which has already been devoted to a public use for that purpose. When, however, later they decide to put Tavares and his associates out, to take over whatever interests they have and to take the property for a navy yard, why, then obviously we are confronted by a different proposition, and in view of what has happened since, in view of what the property is being used for, I would not feel much like arguing that that was not a use for which the property could not be condemned, because, after all, the establishment of a navy yard is an entirely different thing than the use of the property to grant an option to a private concern. [39]

It seems to me, your Honor, that that goes directly to the question of when is this valuation. Here is another interesting feature in that regard, as I gather from the various instruments that have been filed by the various parties. Unfortunately for myself, I did not get into this action until a week ago Friday, and I am at a bit of a disadvantage, but it seems that in March, 1945, and that was after this amended complaint had been filed, the representatives of the Tavares Construction Company and their associates found it necessary to endeavor to establish just exactly what it was that the government was seeking to do by this action. In other words, there isn't anything in the amended complaint that would indicate on the face of the pleading that the purpose then was any different than the original purpose. In the original complaint it indicates that they proposed to condemn a fee in the property.

So in March of 1945 a motion was made to compel the government to file a bill of particulars so that it could be

determined as to just what it was that was being sought as against these other defendants, and it seems to have been as a result of those proceedings that it was then made plain that it was the government's purpose to acquire by the condemnation proceeding Mr. Tavares' company's leasehold, and his option, and any other interests that he might have, so that where the action started out as one to condemn property to [40] put the Tavares interest in charge of the property, it has now wound up to and has changed its character in some fashion so that now it seeks to take away from Tavares everything that he and his associates had in the first place.

I cite those things as demonstrating, and I think it is demonstrated beyond any possible argument, that there has been a complete change of what was sought in this proceeding between 1942 and 1944, when the amended complaint was filed, and when the declaration of taking was filed and when the money was put up.

Now, if we treat this as a condemnation proceeding whereby title passes in 1944, as declared by the act of the department, if we treat it as being at that time that the government decided that they were going to take this property for a navy yard, and we are going to take not only the interests of National City and other properties, but we are going to take also the interests of the Tavares Construction Company, then it would seem like in all reason we should treat it as an action commencing in 1944.

Now, I have looked as diligently as I could to find out what is the effect, in so far as determining the question of the time of valuation is concerned, by a case where the action is commenced and the declaration of taking is filed subsequent. I have found two or three cases that have

to do with that, but in none of them has there been involved any such [41] state of facts as are here, in none of them has there been involved the question of public property, and in none of them has there been involved the question of a change in the purpose of the entire suit. It has been held that where the declaration of taking is subsequent to the filing of the suit that the owner of the property may be permitted, if you please, to fix his valuation either at the time of the commencement of the suit or as of the time that they took possession, but in all the cases I have found that seems to be merely for the question of deciding when shall the interest start from, and they hold, and I think correctly, that in the ordinary case they may value the property as of the time when the government actually physically takes possession, and give to the owner of the property interest upon that entire award up until the time that the government makes its declaration of taking and deposits its money and the title passes. But I do not find that that is compelled by a statute. That appears to be merely the ruling in the various cases of the court for the purpose, if you please, of promoting substantial justice, and in none of those cases do I find that there is involved what as a matter of common knowledge is involved here in San Diego, that there has been a sharp change in market values between the two dates. That is a matter of common knowledge, that the market values in and about San Diego have changed tremendously between 1942 [42] and 1944. If we go around the town, as to ordinary properties we find cases where market values have doubled in that time. So from the standpoint of National City, and it is to that alone that I am addressing this matter, we find that the taking in the first instance, or, I mean the action in the first instance prior to the taking was for a purpose that

is entirely questionable. The power of the court to take public property so that the government may on the following day, within 24 hours, give an option to a private concern is, I submit, very questionable. But whatever that purpose may have been, it is now apparent that that purpose has been entirely abandoned in this action. The government does not seek it now for that purpose at all, and if the rule allowing the owner of the property to take back and set his valuation back at the time of the first taking is to promote substantial justice, and I find nothing else given as a reason for it, I would say with equal propriety, for the purpose of promoting substantial justice, if the market value of the property has changed, so that when they finally undertake to take for the purpose that now prompts them to bring this case on for trial, and when they abandon that first purpose, when they comply with the statute and cause the title to then be transferred to the United States, then I submit in all fairness and justice the time of the valuation should be the time when the title was taken over. [43]

I submit that does no injustice to the government, and particularly for this reason, that the matter of filing a declaration of taking and causing title to transfer, and under the War Powers Act they may get possession, but the right to fix the time when title will be vested in the government is entirely within the government's control. They could have filed a declaration of taking at the commencement of this action. They could then have put up the money. They could have then proceeded to take the property, if they really wanted to take it at that time. They did not see fit to do so, and, as a matter of fact, by the showing that their counsel made at the time of the motion to dismiss, they had apparently then come to the

frame of mind that they were no longer particularly interested in that taking. They conceded that the purpose that they wanted to take it for was now no longer a motivating purpose, but that they would like to have the action merely continued over a bit, as expressed by counsel, because it might be that the Navy Department would want to take the whole thing over and take it from there.

We submit that that is a complete abandonment of that original taking and of the original purpose, and that our valuation should properly be fixed as of that time, because, after all, that is when they ultimately decided to take title. [44]

One of the reasons I have been so insistent in wanting to present this beforehand was because by reason of these various things the witnesses, as I talked to them, were somewhat confused as to the proper basis for the valuation. One of the first things that bothered them was the fact that anyone familiar with tidelands knows that there is a constitutional provision against the transfer of the lands or the vesting of them in individuals, and the question seemed to bother some of the witnesses as to how you could base an opinion on the reasonable market value of something which cannot be sold. It is our position, however, that that is all eliminated, that what the government takes is a fee, and, obviously, in all fairness that is what they should pay for, and I take it from the memorandum that has been filed on behalf of the government that they are in accord with that purpose. I have the feeling, therefore, that we should have a fee and that there should be awarded to the State the valuation of their reserved interests, and which I was agreeably surprised to hear now was \$1.00. That was the first time I heard that, today.

As to the San Francisco Bridge Company, which held the lease, the value of that leasehold interest will have to be determined. We have discussed it some and we had some hope we might agree amongst ourselves as to the percentage of the piece of land that was affected by it. But, in any event, [45] unless we do so agree, then it will have to be determined. But it is my contention, on behalf of National City, that the witnesses should testify as to the reasonable market value of this property as of 1944, at the time title passed, and that that amount, whatever it is, should be awarded to National City. [46]

Now, one other thing that has been mentioned this morning, but counsel have not argued it. That is the question as to whether or not the so-called unit rule should be applied as between National City and the various interests represented by the Tavares Construction Company. I take it that it is the position of counsel representing them that the unit rule, because of the peculiar situation involved here, should not apply, and with that I am in accord. It seems to me that there is involved particularly an interest created by their own act, which is something over and above and different from the interest raised by any lease that would be given by the owner of the property. In other words, National City had nothing to do with the giving of that option. That was something which the government created, another and different thing, and for that reason it has been our position that the interests of the Tavares Company and associates and the interests of National City are entirely separate.

Mr. Landrum: If your Honor please, may I say just a word? I call your Honor's attention to this very same question that was raised by a motion to strike the answer of the San Francisco Bridge Company in this case, and

your Honor ruled upon that question. Your Honor's ruling is dated April 7, 1945. Counsel appeared before your Honor. The government filed a motion to strike certain allegations of the answer of the San Francisco Bridge Company upon the ground [47] and for the reason that those allegations of this answer undertook to set up that they were entitled to the value of this property as it had been improved by the government of the United States. The United States made a motion to strike that answer and your Honor granted it by your order which was dated April 7, 1945.

It simply boils down to this, as I understand counsel's position. It is his position that the city of National City claims to be entitled to this land or water, whatever it is, as it existed on the 23rd day of November, 1944, when the government of the United States had spent hundreds of thousands of dollars in there dredging and improving it.

I only know of two condemnation cases, your Honor, along this line. One of them happens to be the Miller case in 317 U. S. 369. I had the honor of trying that lawsuit, and the question here is plainly answered in it. The Supreme Court of the United States said that they were restricted to showing the value of the land which was acquired, in the Miller case, clear back to 1937. The Central Valley Project had at that time been announced. I am sure your Honor is familiar with the Miller case. It answers counsel's question precisely and, in addition to that, the law of the case has been made by your Honor in the San Francisco Bridge Company matter. And, if the position is correct, then, as the United States Supreme Court said in the Miller case, the [48] government will not be required to pay for something it itself has made.

There isn't any question but that he is not entitled to claim the valuation as of December 23, 1944, what the government has expended in making that land what it was at that time.

So I again tender to the city of National City a stipulation letting them fix any reasonable date within the year 1942. And may I reply just briefly to that, your Honor? The matter that I am presenting is not a question of any valuation caused by any improvement made by the United States government. The question is the market value of the property in that two-year period has greatly increased but that hasn't anything to do with what the United States government did at all. That is merely a change in conditions. So long as they have been the original basis of the taking and so long as by the very natural process of the change in valuation that has taken place the property has become tremendously more valuable in the meantime, then I submit we should be entitled to have that reasonable value, that reasonable increase in value, regardless of anything that the government may have put on there. We are seeking to take advantage of the natural increase in the value of the property.

Mr. H. G. Sloane: Your Honor, a motion to strike was made in April, 1945. It had nothing to do with any of the valuation as of 1944. The fact is that the summons and com- [49] plaint in this cause were not served on the San Francisco Bridge Company—I can't speak for the other defendants—until January 23, 1945. That was the first official cognizance that we had of the pendency of the action. That is the first time that we were ever furnished with a description showing what property was sought to be taken, and it there appeared that the govern-

ment was seeking to take a parcel of land, our portion being what is designated as Parcel 7 and a parcel designated in the amended complaint, which was served with the summons, as Parcel A. I quite agree with counsel for the government that the sensible thing to do and the only way to avoid confusion here is to fix a rough average, if it must be, as to the date of taking. He suggests 1942, December, 1942. We are merely suggesting 1944. And there is no justification whatever, that I can see, for including in a condemnation action which was filed in 1942 the description of 30 or more acres of land which was not even referred to in that condemnation proceeding and which was not a part of the pleadings in the case until the date of the supplemental and amended complaint, which was along in 1945, as I recall it.

The Court: Is that Parcel A?

Mr. Sloane: Parcel A, the water area. Now, I concur in the theory advanced by Mr. Monroe that the whole picture presented here is that of abandonment of the original proceeding, a diversion to a different purpose, the inclusion of a [50] greatly increased parcel of land, and the prosecution then, for the first time, began in earnest. As your Honor will recall, the matter went without action for years and it was not until a motion was filed for a dismissal of the action that the government was stirred into real activity.

We must not lose sight of the fact this is the government's case. This is the parcel of land which they sought to condemn. They produced their descriptions and, in their own due season, served them on counsel.

If I may just advance the position of one of the parties to this action, who has a mere bagatelle of about \$90,000 involved, we were brought into the case, on January 23,

1945, by service of summons and an amended complaint. On looking at the complaint, we found in there that there were two parcels of land in which we have an interest. We put in an answer setting up our interest. The motion which was brought before this court to strike had nothing to do with values as of 1942. It had to do with values at the date of filing our answer, which was in 1945, and it was only based on the provisions of the statute of the State of California that, where there has been an inexcusable delay of this sort of thing, bringing a condemnation suit to trial, the defendant may, at its option, defer the date of valuation to the time when the case becomes active and when the case is brought to trial. That is a very salutary provision which I think could be incorporated [51] into the federal practice. But your Honor held that that was a matter of substantive benefit and, hence, it was not controlled by the statute of the State of California. Therefore, the order of this court was made merely striking out those portions of the answer which were incorporated, supposedly, in pursuance of the procedure authorized by State statute. I have before me the order granting the motion to strike and have before me the complaint, portions of which were stricken. There were two portions there, one, in which the city of National City set up the fact it had exercised an option, which I think was immaterial, and it was stricken. The other point to which counsel refers was our claim set up in this language in the answer of the defendant San Francisco Bridge Company to the amended and supplemental complaint:

“VI. That the value of the estate and interest of this defendant in said lands taken and sought to be condemned by the plaintiff was on the date of issuance of summons the sum of \$90,000 and now is the

sum of \$150,000, that improvements were put upon the property subsequent to issuance of summons, but the service of summons has not yet been made on this defendant; that this action cannot be tried within one year after the date of commencement thereof and no delay has been caused by this defendant.

"Wherefore, defendant San Francisco Bridge Company prays for judgment in the sum of \$150,000, for lawful interest, [52] and for all other proper relief."

That had no relation at all to the year 1942. It had relation to the year 1945. We are entitled to damages as of the date when the trial was deferred, to and the matter was first brought up for adjudication. The court ruled against us on the latter point but made no attempt to rule on the former point. So the question here is a matter of first impression in this case, as to whether the date for compensation shall be 1942 or 1945. How can it possibly be 1942 as respects Parcel A? The government has given no indication, as far as the record shows, that it had any interest in it then. Parcel A was brought into the action for the first time by the amended and supplemental complaint. And it is our position that, therefore, there was a virtual abandonment of the prior taking and a new action was commenced and all the matters are now before the court.

Mr. Landrum: If your Honor please, I might say another word. if I may be permitted to do so. I have been in this case about three weeks. I have examined this record and I have heard the statement made time, time and time again, that the government of the United States had sought to condemn this property and to turn it over to the Tavares Construction Company. If your Honor please, there isn't one scintilla of evidence in our files to that

effect, and the very evidence that is in there in that contract of December 28, 1941, with [53] the Tavares Construction Company, does specifically contemplate that this property may be turned over to any branch of the government of the United States. I have found nothing to substantiate the statements that this action was brought for the purpose of turning this property over to the Tavares Construction Company. The original petition in condemnation asked for a fee simple title. And Judge Yankwich was unquestionably correct when he said that we had taken whatever interest the Tavares Construction Company had in this property.

The Miller case goes clear back to 1937, when the plans for the Central Valley Project were first commenced, and we didn't start the lawsuit until years after that, and the Supreme Court of the United States said that we would value that land as it existed when the plans and announcement of the Central Valley Project were first approved by the Congress of the United States. And we hadn't been in there for years after that.

The Court: I am inclined to think that the Miller case settles the issue, and by the Miller case I mean the decision of the Supreme Court of the United States in the case of United States v. Miller.

The only phase of the inquiry concerning which there may be some measure of doubt is presented as to Parcel A here.

As I recall the factual situation and, if the court is [54] not correct in its recollection, you may call my attention to it, there was no token for title to Parcel A, either in the original petition of the claimant or in any other procedural memorial, until the declaration of taking was filed.

Mr. J. M. Martin: If your Honor please, there was an amendment made for the purpose of taking in Parcel A. That amendment has been overlooked. That was an amendment dated September 23, 1924, by which Parcel A was added to the original complaint.

The Court: That was the first memorial as to Parcel A?

Mr. F. L. Martin: That is correct, your Honor, and it was included in the general declaration. In October, 1944, there was an amended declaration of taking, or I will call it a second declaration of taking, which took Parcel A. That was before the general amended declaration we have been referring to, as of December 23, 1944.

The Court: It would seem, even under the broadest interpretation of the Miller case and the doctrine stated in it, that as to Parcel A probably the date of the fixing of its value is different than the other parcels which were included in the original petition. As I recall the Sunset Cemetery case, in the Seventh Circuit, it indicates the pertinency and effectiveness of a declaration of taking, and that constitutes a muniment of title as far as the government is concerned. That is true particularly with respect [55] to Parcel A. It can be, I think, argued that the date of compensation should be fixed as at the time when that parcel was first included in the acquisition.

Mr. Landrum: If your Honor please, the Sunset Cemetery case, as I recall it, was a case in connection with the Curtiss Wright Airport in Chicago, where the Cemetery Association had a right of easement across the Airport. I was in the trial of the Airport case. But the Miller case says this, and I want to try to explain it as plainly as I can. It isn't the date of taking that determines the question of when we shall determine value. They are two separate

and distinct things. In the Miller case the court restricted the landowners to a valuation of 1937, as I recall it. The facts of the matter are that they went up there and bought a lot of this land and subdivided it into lots. We moved the Southern Pacific Railroad out and had to take some of their lots, and they wanted the value as they had subdivided it. The court held them to a valuation as of the date that the actual construction of the Shasta Dam had become public and it became known that this land was going to be included in that project. My position is this, that the date upon which we took Parcel A was the date when we actually went in there and interfered and started dredging it. That certainly was notice to the world that that was within this project, when we went in there and did that. They are two separate things. The date [56] of the taking and the date of valuation are two separate and distinct things. It is the date of valuation that we are contending for here and that is the time that we just went in and did extensive dredging on Parcel A.

Mr. Monroe: Might I reply to that, your Honor? The place where that argument completely breaks down is the fact that the real complexity in this case is caused by the fact that they are proposing, as to a part of them, to value the land as of 1942, and, as to part of them, as to 1944, and there is nothing in the pleadings to substantiate the distinction.

The Court: The Supreme Court stated in the Miller case, reading from the decision on page 374: "Respondents correctly say that value is to be ascertained as of the date of taking. But they insist that no element which goes to make up value as at that moment is to be discarded or eliminated. We think the proposition is too broadly stated. Where, for any reason, property has no market,

resort must be had to other data to ascertain its value; and, even in the ordinary case, assessment of market value involves the use of assumptions, which make it unlikely that the appraisal will reflect true value with nicety. It is usually said that market value is what a willing buyer would pay in cash to a willing seller. Where the property taken, and that in its vicinity, has not in fact been sold within recent times, or in significant [57] amounts, the application of this concept involves, at best, a guess by informed persons."

Parenthetically, I think that is an axiomatic truth there. Continuing with the Supreme Court's observation:

"Again, strict adherence to the criterion of market value may involve the inclusion of elements which, though they affect such value, must in fairness be eliminated in a condemnation case, as where the formula is attempted to be applied as between an owner who may not want to part with his land because of its special adaptability to his own use, and a taker who needs the land because of its peculiar fitness for the taker's purposes. These elements must be disregarded by the fact finding body in arriving at 'fair' market value.

"Since the owner is to receive no more than indemnity for his loss, his award cannot be enhanced by any gain to the taker. Thus, although the market value of the property is to be fixed with due consideration of all its available uses, its special value to the condemnor as distinguished from others who may or may not possess the power to condemn, must be excluded as an element of market value. The district judge so charged the jury, and no question is made as to the correctness of the instruction.

"There is, however, another possible element of market value, which is the bone of contention here. Should the

owner have the benefit of any increment of value added to the [58] property taken by the action of the public authority in previously condemning adjacent lands? If so, were the lands in question so situate as to entitle respondents to the benefit of this increment?

“Courts have had to adopt working rules in order to do substantial justice in eminent domain proceedings. One of these is that a parcel of land which has been used and treated as an entity shall be so considered in assessing compensation for the taking of part or all of it.”

Then it discusses the question of severance damages and then, continuing: “If a distinct tract is condemned, in whole or in part, other lands in the neighborhood may increase in market value due to the proximity of the public improvement erected on the land taken. Should the government, at a later date, determine to take these other lands, it must pay their market value as enhanced by this factor of proximity. If, however, the public project from the beginning included the taking of certain tracts but only one of them is taken in the first instance, the owner of the other tracts should not be allowed an increased value for his lands which are ultimately to be taken any more than the owner of the tract first condemned is entitled to be allowed an increased market value because adjacent lands not immediately taken increased in value due to the projected improvement.”

I don't know just what that statement means. I think the [59] first part of it probably leans to the thought that the enlarged taking, the inclusion in an acquisition of lands which were not originally acquired, where the owner of such excluded lands retains area until later, may be able, in an appropriate proceeding, to show the increased value or increment that has resulted from the time

of the original acquisition to the time of the increased acquisition by the inclusion of his area. But the latter part of the statement would seem to remove that from consideration.

I can't reconcile the theory of just compensation as to Parcel A with the position of the government that, regardless of whether they included Parcel A in the original acquisition, or whether it was in the mind of the government at that time, in the construction of the project, to acquire it; that "we didn't acquire it but later on we did manifest a token," as Mr. Martin has suggested, "in October, 1944," that that was to be a part of the acquisition.

Mr. Landrum: Your Honor, may I state just this with relation to that Miller case? Here is the position which the government takes, that, on the first day of April, 1942, the government had already started the construction of this shipyard, and, in 1942, as a part of the construction of that shipyard, they went, with dredges, on Parcel A and dredged it out. It is our position, under the Miller case, that right on that date, whenever it was that they went in there, [60] they showed by their actual work on Parcel A that it was a part of this shipyard and that that is the date that it should be valued. They went in there and spent hundreds of thousands of dollars dredging out Parcel A, that is a part of the shipyard. They went in there on that date and were dredging it out and took possession of that land, and I believe the Miller case holds that that is the date of valuation.

I feel, if your Honor will give me just a moment to look at that Miller case, I can pick out what I am talking about.

The Court: You may take more than a minute, if you wish.

Mr. Landrum: In that case the court restricted them and, when they argued a hypothetical question as to what was their opinion as to the fair market value on such and such a date, my objection was that it included an increment due to the taking, and the court restricted them back to 1937.

The Court: And because the government, through the action of Congress and through the appropriation act passed for the construction of the Central Valley Project, had indicated clearly and irrevocably the date of taking, but that isn't the situation here according to the statement of counsel, as I take it. Here the situation is changed but the Supreme Court said in the Miller case, in my judgment, those are factors which must be considered; that you can apply the rule of ipse dixit and say it is general but as to what the compensation shall be is based entirely upon the variance that [61] exists. Here the government commenced its proceedings to acquire a certain area and set up the area. Various negotiations ensued. Various transactions and agreements were made, and so forth. Then, after the project had begun, it was concluded that it should be enlarged, and Tract A was included in the acquisition.

It seems to me to say that those who have a compensable interest in Tract A should not be required to establish the interest as of a date when the government didn't take it, when the government made no manifestation, and that it would deprive the property owner of a right to introduce his evidence to show the difference in the situation between the date of the original acquisition and the date of the acquisition of Tract A.

Mr. Landrum: If your Honor please, if I follow your Honor, it is this, that they are entitled to claim Parcel A

in its condition as it was at the date of taking in 1944, with it entirely changed by virtue of the dredging the government had done on it.

The Court: I am not speaking as to what the evidence may show at all.

Mr. Landrum: I am concerned about that angle of the situation.

The Court: You will not get any indication from the court as to what line the evidence will take in the case. You [62] will get the date of acquisition, which will be fixed by the ruling at this time.

Mr. J. M. Martin: If the court please, in order to avoid any subsequent confusion as to what we refer to as acquisition, to my mind there seem to be two classes of acquisition, one, in condemnation, and the other is where the government simply goes and takes it. Our evidence will show we were directed to proceed upon this property and commence dredging upon Parcel A and that it actually commenced on the 27th day of August, 1942. If that be termed an acquisition as distinguished from a taking in eminent domain, I would like for the record to be clear that we are referring either to an actual taking or a taking through court action. It seems to me there may be two different rules apply. Had there been no condemnation and had an action been filed in the Court of Claims as of August 27, 1942, the value would manifestly be as of that date, but here the government, if the court finds there was an actual taking on August 27, 1942, subsequently files a condemnation suit. The question is not so much what has been considered as the change in the factual situation, not present in the Miller case, but this is a factual situation where there was an actual taking by the government having diirected my client to proceed.

The Court: That is what the court adverted to when it stated it is not going to indicate at this time to the govern- [63] ment anything that would foreclose a factual investigation of what the Supreme Court said are the factors in an endeavor to arrive at a just compensation for a taking. It may be that, at the conclusion of the case, the court would feel that the weight of the evidence required that an instruction be given to the jury that the date fixed by law for the valuation would be one date. It may be that the evidence would prompt the court to conclude otherwise. That would be a matter to be covered by instructions and not by any ruling at this time which would foreclose an inquiry as to the factors which may go to enable the jury to estimate a value. Do you understand that?

Mr. Landrum: I understand your Honor's position, but these expert witnesses must be given a date to work from. There is the difficulty. We will be very happy to proceed and I see your Honor's position, and I am very frank to say to your Honor that that is absolutely correct, but I am trying to get some sort of an understanding as to the date.

The Court: I don't see how we can do that.

Mr. Landrum: While we are discussing that, if I might be permitted to transgress on your Honor's time for just a moment, the question of the procedure in this case is important. Who is going to go forward tomorrow morning?

The Court: I think the defendants should go forward.

Mr. Landrum: Yes. And the government respectfully [64] moves the court in that connection that the landowners be required to go forward.

The Court: I think so.

Mr. Crouch: If possible, I think the burden should be upon the defendants and I think that the burden is upon the defendants in this case, and that the government has no right to ask the court to tell it the order of their defenses. It so happens in this case that all the defendants, after considering the evidentiary angles that are involved, deem that the case can best be presented to the court and the jury and can best be understood and that the convenience of everybody will be served by the order which we have already agreed upon.

The Court: Do you mean that the government has agreed upon it?

Mr. Crouch: Yes; the defendants have agreed.

The Court: The government has not agreed, has it?

Mr. Crouch: No. The government, we do not think, is interested.

The Court: All right. I just wanted to understand it.

Mr. Crouch: Just the court and us. In order that the testimony of the witnesses may be understood, in order that they may have a visual picture of what is involved, the defendants whom Messrs. Martin and myself represent, Tavares Construction Company, have prepared and will offer in evidence a model of the plant and a map of the area and certain factual data on it, and then the witnesses that later come along will be able to point to the map and the model in explanation of their testimony, and the jury will get the picture clearly. But those matters cannot be presented if the city of National City is required to put on its case first. So, at the request of the city of National City, we have prepared all of the testimony of our witnesses, based upon the fact that we will present our case first, and the city of National City has prepared its witnesses on that sup-

position. And now, if that is changed at the instance of the government, we feel, as an interested party, the burden being upon us, that the defendants should be allowed to run their own side of the lawsuit and in their own way. [66]

Mr. Monroe: Might I suggest on that, your Honor, Mr. Crouch is correct as to what has taken place between the defendants. Let me say that from the standpoint of National City we are depending almost entirely upon some of the same witnesses as the Tavares Construction Company. There is a great deal of data that has to be built up as a preliminary to the testimony which we would put on. Because of the fact that we have this understanding with counsel for Tavares and the allied interests, those are matters which, frankly, we have not fortified ourselves on. Were we compelled to put on our case separate and apart from their testimony we would be seriously embarrassed in doing so.

Now, beforehand we figured that the most orderly procedure would be for them to put those witnesses on first. As a matter of fact, what will happen is this: As your Honor is aware, the issues are such that the great mass of the testimony that will come into this case has to do with those interests. What that is in, the matter of putting on the case on behalf of National City is going to be very much simplified. It will take us only a matter of a few hours to completely cover our case, but that is upon the theory that will already be built up, and it will be built upon testimony that would not otherwise be available to us. For that reason I respectfully ask that we be permitted to follow the procedure we have agreed upon. [67]

The Court: What is that procedure?

Mr. Monroe: That the Tavares Company first put on its evidence, and that then we follow with the evidence for National City.

Now, it may be as the case proceeds that it will seem orderly with some witnesses, when they have testified as to part of the case, that they complete their testimony at that time. We have felt, however, that it would be less confusing to the jury that where a witness testifies both as to the Tavares interests and as to National City, to let him first testify to their interests and then, if necessary, bring him back and not have it mixed up in that fashion.

Mr. Landrum: If your Honor please, I realized that we were getting somewhat into deep waters. This is another serious question in the trial of this action. If your Honor please, the interests of the City of National City and the Tavares Construction Company must necessarily be conflicting, in view of the provisions of the so-called lease and option that the government of the United States gave to the Tavares Construction Company, in that it provides that what the government of the United States has to pay for this land shall be a portion of what the Tavares Construction Company would have to pay to take up its option.

Now, their interests cannot be other than adverse because if what the City of National City was to get from the [68] government of the United States for that option goes to the question of how much Tavares would have to pay for it, it would increase the cost that Tavares would have to pay to the government. Therefore, it is to the interest of the Tavares Company, as I see it, if the court please, to reduce their verdict in this case.

Now, here is the way I see it, if your Honor please,—

The Court: You had better let them handle it and not have you handle it.

Mr. Landrum: All right. I feel that I should say that to your Honor, and in addition to that, if they come in here and place a situation before this jury by the Tavares Construction Company presenting its evidence, it will start that jury off with an entirely erroneous impression with relation to what this case is about, and we very earnestly suggest to your Honor that the procedure, in order that the jury may understand it, would be for the landowners to proceed with their evidence, followed by Tavares. We present that to your Honor, because we feel that that is proper. Now, if they have a map or if they have a model which is made by the Tavares Construction Company, that map and model showing the conditions as they existed after this yard had been built upon this land, certainly would not be admissible as to the bare land itself, but a jury is going to have it immediately, if Tavares proceeds first, and we feel, if your Honor please, [69] that it is absolutely the wrong way, but that they should start with the land bare and let the construction of the shipyard come upon it, and let Tavares present his claim.

Now, that is a matter for your Honor to determine. I realize that.

Mr. John M. Martin: If the court please, as I understand Mr. Landrum's argument, it virtually boils down to the fact that the government is of the opinion that to let the defendants proceed as the defendants think advisable might be unfavorable to the government and, therefore, the government wants us to proceed in the way it thinks is most fair to the government. This is rather an unusual request to make of the defendants, parti-

cularly where the government did not see fit to file two separate suits. They could have filed one against my clients for trial before a jury. They did not do that, and my clients were dragged into the law suit some two or three years after it started. They knew it would be tried in one law suit, before one jury, and I say to the court that we are entitled to make our defense as defendants in the best way we can so long as we abide by the rules and the discretion which your Honor may properly exercise. I do not think, because these facilities have been destroyed and no longer exist for the jury to view them as they would in the ordinary case, is any reason why we should not let the jury visualize the site as it existed on December 17, 1944, [70] when it was taken. We have prepared a model to show the facilities, to show the size of the bulkheads and quay walls, and everything else, as installed as of that time. What is the difference as to when the jury acquires that information if sometime before the defendants rest their case they are going to have all the facts before them? Why not let them have all the facts that existed? What I would like to do, and what I now ask permission to do, is to call our chief engineer and have him explain, as our first witness, this model, the scale to which it has been prepared, the areas which it shows, that it is correct; and the same with our general maps, which cover the soundings, show the dredged and undredged areas before we commenced our work of dredging. I would like to defer counsel's opening statement, and by that I mean my own opening statement as counsel for Concrete Ship Constructors, until we have put on one witness merely to identify the models and the maps, so that these exhibits may be received and so counsel in the making of his opening statement have the benefit of the clarity which can be gained by using the

maps and the models as received in the case. As I say, I would like the privilege of deferring the opening statement until that one witness may be called for the purpose of identifying those models and maps.

Mr. Landrum: Your Honor please, I will ask you to forgive me, but I understand under the rules that an opening [71] statement should not be an argument and, as I understand it and as I feel, it would be absolutely unfair to permit the bringing in of a model to be used in an opening statement. I say that to your Honor. If I am in error, I trust I will be forgiven.

The Court: We are going to follow the sequence of the litigation in the presentation of the proof. That is the only safe method of trying a case of this type. Then there is no psychology or atmosphere in the case, in an effort to arrive at the truth. That means that the property owners should proceed first with their proof, and then these other features, as between Tavares and the interests of National City, can be explored by proper evidentiary methods. That will be the order of proof.

Mr. Landrum: Yes, your Honor.

The Court: Now, can you give the court any idea as to how long it will take to hear the evidence?

Mr. Landrum: If your Honor please, could I transgress just one moment further? I want to state to the court now the position that the government of the United States is going to take, in so far as the evidence of Mr. Tavares under that contract is concerned. I have another memorandum here, your Honor. I realize that I could have opened this whole thing up the other day, but I have seen fit to try to make a little objection to the Tavares' evidence. I should like to present [72] that to your Honor, and if you want it, all right, and I will give counsel a copy.

The Court: I will take it.

Mr. Landrum: I do that because I want our position on that thing to be known absolutely at the beginning.

The Court: Did you present that to Judge Yankwich at the time of his ruling?

Mr. Landrum: No, sir, I was not there.

The Court: I am not speaking about you personally when I speak of the government.

Mr. Landrum: No, sir, it was not.

The Court: I am not speaking about any of you gentlemen personally, but I am talking about your respective interests.

Mr. John M. Martin: Might I ask the court this question, whether by the ruling is meant that each of the land-owners will be required to close his case before the Tavares Construction Company proceeds?

The Court: I am not going to anticipate anything, Mr. Martin. I told you what the order will be in the trial.

Mr. John M. Martin: The only reason I ask is in order that I may afford my witnesses the information as to whether it will take two or three days before they should return, or just when.

The Court: That is the question I just propounded.

Mr. John M. Martin: Very well. [73]

Mr. Landrum: Now, your Honor propounded a question as to how long it is going to take to present the evidence. I am firmly convinced that we can try the case in not longer than six days at the outside. I do not see how we can take that length of time. I promise your Honor that, so far as the government is concerned, we are not going to take much time in cross examination, and we will put on our case in chief in at least one day.

The Court: Now, I do not want to limit you, gentlemen, in your estimates as to time, but I want you to be as accurate as you can be. You have had a long time to prepare this case and ought to know about how long it will take.

Mr. Crouch: In order that we may be advised as to the procedure, after the City of National City has completed its case and rested, will the government then be required to put on its evidence as to that defendant,—

The Court: No.

Mr. Crouch: Or do you take the evidence of the other defendants first and complete it as to all of them before the government proceeds?

The Court: Yes, sir. The burden is on the property owner and his case should be presented first. He is dissatisfied and does not accept what the government wants to give him. It is his burden to establish what he is entitled to before the government is called upon to answer the case. [74] When he does that, then the government will be required to answer. There can be no doubt about that.

Mr. Monroe: I think I understand, your Honor. Now, may I be permitted to file an amended answer on behalf of the City of National City? The only amendment we care to make is to increase somewhat the demand as set up in the original answer. I might say this by way of explanation, that at the time of the preparation of the original answer it was prepared with the thought that the estate of National City was a limited estate on a right to collect rental. Now, if, as has since developed, and I think beyond any question that what we have is a fee, it makes a small difference in valuation, but neverthe-

less a difference which should be reflected in our pleadings.

The Court: I do not see how that changes the issues any.

Mr. Landrum: No, your Honor, if it is simply to increase.

Mr. Monroe: That is all it is.

Mr. Landrum: If he is simply increasing his prayer for relief, that is correct.

The Court: In other words, Mr. Monroe says that the original answer, and I think he is correct, did not assert the right on the fee basis of ownership.

Mr. Monroe: That is correct. We based our valuations merely on the basis that all we had was the right to collect [75] rentals, and I am satisfied that is not correct.

The Court: Any objection?

Mr. Landrum: I would ask these gentlemen to handle that.

Mr. Whelan: No.

Mr. Landrum: They say it is all right, your Honor.

The Court: It will be filed.

Mr. Sloane: Your Honor please, the San Francisco Bridge Company would like permission to file an amendment, but instead of raising my sights, my first application is to reduce them. In error we have alleged that the San Francisco Bridge Company had a lease of the entire area of parcel A, which would be something over 30 acres. That is not correct. It should be confined to the portion of area A, which is some tenths, or which amounts to about 10 acres.

The Court: I think you called attention to that in your memorandum.

Mr. Sloane: Yes. Also, I think it may be that during the course of the trial we may suggest that some amendment should be made. There is this further possibility on the line of argument brought forth this afternoon: We answered upon the theory that there was a taking of both parcel A and parcel 7 at the same time. Now, if it develops that there was a taking at two different dates, it occurs to me now that it may be in order to plead a valuation of what was [76] taken at the first date, together with severance damages, and the value taken on the second date. I am at a loss now to know whether or not it will develop, but counsel for the government has been so fair and open about prognosticating his movements that I wish to give notice that I may have to make an application to amend the pleadings to conform to the proof.

Mr. Landrum: And counsel's statement is a further indication of what deep water we are getting into when he talks about severance damages.

The Court: Without indicating any intimation that the motion may be later interposed, if it is simply a motion to conform to the proof, that as a matter of course will be proper. But if it is other than that, it will be denied.

Is there anything further to be discussed, gentlemen?

Mr. Landrum: That is all we have, your Honor.

The Court: Gentlemen, I want to say that there isn't any provision in the federal statutes for a daily transcript for the judge in a case of his kind, but if counsel—

Mr. Landrum: Pardon me, your Honor.

If your Honor please, there is one other matter which Mr. Martin and I talked about. That is the question of an alternate juror. For the purpose of the record, and

in order that there may be no question, the government desires to tender to the gentlemen on the other side a stipulation to the [77] effect that should an occasion or a situation arise at any time throughout the trial of this action, even after the jury has gone into the jury room to deliberate, that we will stipulate and agree if your Honor in your discretion should see fit for any reason to excuse one or more members of this jury, the remaining members may return a verdict and it will be accepted by all parties.

The Court: What is your attitude, gentlemen?

Mr. John M. Martin: So stipulated, your Honor.

Mr. Monroe: So stipulated.

Mr. Sloane: So stipulated.

Mr. Muir: So stipulated.

The Court: So understood by all of the parties.

Now, gentlemen for the defense, I did not get any indication from you as to what you thought would be the time required for the proper presentation of your evidence.

Mr. John M. Martin: May I ask one question before answering that?

The Court: Yes.

Mr. John M. Martin: I would like to ask permission of the court for the deferring of my statement as to what we intend to prove until we come to the time to put on our evidence. In other words, if National City is going to have its witnesses consume two or three days time, I think it would be confusing to the jury for me to make my opening statement [78] first, and confusing to my own case.

The Court: I think each side should have the opportunity at the appropriate time to make its opening statement. I do not believe that the defendants should be

required to consolidate their opening statement into one opening statement. Each defendant should have the right to present his case to the jury, and his attorney will have a right to make an opening statement preceding the presentation of his case, and which I take it will be an opening statement and not an argument.

Mr. John M. Martin: That is right.

The Court: And knowing counsel, I think that will be true.

Mr. John M. Martin: That is right. In other words, if I am to be prepared to make an opening statement tomorrow morning, I would like to know it, and as I get your Honor's position, I will not be required to make the opening statement until I am ready to present evidence on behalf of my clients.

The Court: That is right. I think perhaps the other interests could be presented tomorrow, that is, Mr. Muir on behalf of the Johnsons, the property owners, and then National City.

Mr. Monroe: I would think, in answer to your Honor's question, so far as National City is concerned, I would hope [79] to put in our evidence in a day or a day and a half. I realize that some of the other interests will require quite a bit more time.

The Court: Can you give any indication as to how long you will take?

Mr. John M. Martin: I think it will take us about three days, plus whatever time counsel for the government will take on cross examination.

The Court: Very well, gentlemen. If that is all, we will meet tomorrow morning at 9:30.

(Whereupon, at 3:30 o'clock p. m., Monday, February 17, 1947, an adjournment was taken until 9:30 o'clock a. m., Tuesday, February 18, 1947.) [80]

San Diego, California, Tuesday, February 18, 1947.

9:30 A. M.

The Court: The record may show all present. Proceed.

Mr. Berrey: If your Honor please, Leonard McLaughlin, who was not served with notice of trial in this case, and who is a lessee on one parcel from National City, has appeared and is willing to submit to the jurisdiction of the court and have his appearance entered, your Honor.

The Court: Leonard McLaughlin?

Mr. Berrey: Leonard McLaughlin; yes, your Honor.

The Court: What interest does Mr. McLaughlin claim?

Mr. Berrey: He claims a lease on Parcel 8, a lease from National City, your Honor.

The Court: There should be some memorial filed in the record. Probably you gentlemen could assist him. Haven't you an attorney, Mr. McLaughlin?

Mr. McLaughlin: No, sir.

The Court: Do you expect to employ an attorney to represent you in the case?

Mr. McLaughlin: I was going to leave it up to the National City people to make a decision. I think the National City people are fair enough that, whatever my share is, I will get it.

Mr. Berrey: If the court wishes, the government will assist Mr. McLaughlin in preparing an answer and filing it, [83] setting up his interest.

The Court: I think it would be well to do that. Have you conferred with the gentleman, Mr. Ratelle?

Mr. Ratelle: Your Honor, Mr. Merideth Campbell, the present City Attorney, as soon as he comes, I will intro-

duce Mr. McLaughlin to him and they can see what they can work out.

The Court: Very well. Mr. McLaughlin, your appearance will be noted in the record and appropriate recognition of your rights, if there are any, will be considered in the final decree. It would be well for you gentlemen to get in all interested parties so that, when the case is concluded, it will be finished, and the government is more interested in that, I think, than the others. So that, if you will collaborate with the gentleman, I will appreciate it. His appearance should be properly noted in the record. Proceed with the evidence.

Mr. Muir: May it please the court, I understand that the defendants Carl Johnson and Pearl Johnson proceed first.

The Court: Yes, sir.

Mr. Landrum: If your Honor please, I take it the purpose is to make opening statements to this jury with relation to what it is that each of the parties proposes to prove. Inasmuch as we are now about to proceed with relation to the land itself, with your Honor's permission, I would like to split the government's opening in that at this time I [84] would like to confine myself to the interests of the land itself and then, when we come on with the other portion of the case, when Mr. Martin makes an opening statement with relation to the Tavares Construction Company, I would like to state the government's evidence with relation to that at that time.

The Court: I think so. I reviewed the record a little more thoroughly over the night and this morning and I am satisfied and confident that these interests, other than the land interests and the valuation of fees, are entirely separate from the ordinary and initial proceedings at this time. So that, ladies and gentlemen, we will now take up

the matter of the estimates of fair compensation for the taking of the real property. And the alleged owners or claimants in that property will proceed with their case. If you want to make an opening statement along those lines, you may do so. This interest pertains to what is known as Parcel 9. Mr. Muir, representing the Johnsons, owners of that property, will proceed. You may proceed. [85]

Mr. Muir: Your Honor, counsel, and ladies and gentlemen: I represent two defendants, Carl Johnson and his wife, Pearl Johnson. They are the owners of the land known as parcel 9 in this litigation. We are claiming \$8,000 as the reasonable market value for the fee title of this land, together with interest as shall be determined by the court to be allowable.

Now, we will offer evidence in support of our claim for \$8,000. This property is about one acre in size, located in the area referred to, and it had one improvement on it of a building, a corrugated building. It was adjacent to the Santa Fe spur track and was near the water front, as you will see from a map that will be brought into evidence. So as our first witness we would like to call—

Mr. Landrum: Just a moment. If the court please, might I be permitted to make the government's opening in so far as the land is concerned at this time?

The Court: I don't know about that. Are you going to dispute anything that Mr. Muir said about it?

Mr. Landrum: Yes, your Honor. I thought that we would proceed, if I might be permitted to suggest, by my making an opening at this time with relation to the gov-

ernment's position on all the land matters, but whatever your Honor wishes. I will defer the opening if that is what your Honor feels I should do. [86]

The Court: I think so.

Mr. Monroe: If your Honor please, I was wondering if you would prefer to have at this time the opening statement of all of the landowners?

The Court: The only preference the court has is the orderly presentation of the case, so that it may obviate and avoid, if possible, any confusion both in the court's mind and counsel's mind, and the jury's mind. I think perhaps as each interest is presented that that would be the appropriate time for respective counsel to make an opening statement. I cannot understand what the government means. I did not observe anything in Mr. Muir's statement that would be contradictory. What would be the purpose of it?

Mr. Landrum: My thought, if your Honor please, was that I would proceed and simply outline to the jury the government's testimony with relation to the entire question of land values at this time, in accordance with what counsel has just suggested.

The Court: I think in view of the fact that it was suggested in the memoranda and on yesterday reiterated that the government would withhold its case until the defendants had produced their respective evidence, that we had better adhere to that policy.

Mr. Landrum: Yes, your Honor.

The Court: Proceed, Mr. Muir. [87]

Mr. Muir: I will call Mr. Johnson.

Mr. Landrum: If your Honor please, we have agreed that a little map that I have here covering all of these parcels might be placed in evidence by stipulation on behalf of the defendants and also of the government.

The Court: Is that satisfactory, gentlemen for the defense?

Mr. Crouch: Just a moment. Yesterday your Honor will recall—

The Court: Will you raise your voice a little, Mr. Crouch?

Mr. Crouch: Yesterday we desired the privilege of having a map presented, showing everything, and counsel objected to that line of procedure. Now he brings a map in.

The Court: Have you any objection to this?

Mr. Landrum: Tavares is not interested in the land benefits. We are trying the land now.

The Court: I do not want constant argument between counsel in this case.

Mr. Muir: Defendants Johnson object to the map in that it does not truly portray the exact situation back in 1942, as we see it. For example, the spur track is not indicated on the map, and which is a part of the terrain there, a part of the landmarks, and I think that is important.

Mr. Landrum: Your Honor please, I am sorry. I thought [88] we had agreed that it was to go in.

The Court: Proceed.

Mr. Crouch: I withdraw any objection.

CARL A. JOHNSON,

called as a witness by and on behalf of defendants Carl A. Johnson and Pearl Johnson, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: Will you state your name, please?

The Witness: Carl A. Johnson.

The Clerk: Be seated, Mr. Johnson.

The Court: Your objection is still in the record, Mr. Muir. Do you insist upon it?

Mr. Muir: If the government will stipulate that there was at the time a Santa Fe spur track running along the water front there, I will be glad to stipulate.

Mr. Landrum: I am very happy to stipulate it, if counsel tells me there was a spur track, and he has told me. I will agree it was there.

The Court: What is the attitude of the City of National City?

Mr. Monroe: That is agreeable.

Mr. John M. Martin: We expect, if the court please, to introduce our map and call our engineer, and we expect every other defendant to have a like privilege. [89]

The Court: Mr. Sloane? Is he here representing the San Francisco Bridge Company?

(No response.)

The Court: He does not seem to be here this morning. The map may be filed as an exhibit for the purpose of illustration.

Mr. Landrum: If the court please, could I ask who marks the exhibits in your Honor's court?

The Court: The clerk will mark it.

The Clerk: This will be marked as Plaintiff's Exhibit 1, your Honor?

(Testimony of Carl A. Johnson)

The Court: Yes.

(The document referred to was marked Plaintiff's Exhibit No. 1, for identification.)

The Court: Is there no one representing Mr. Sloane in the court room this morning, or the interests of the San Francisco Bridge Company?

(No response.)

The Court: The record will so show.

Mr. Landrum: Your Honor please, we offer Plaintiff's Exhibit 1 pursuant to the stipulation.

The Court: It will be so received.

(The document, heretofore marked for identification Plaintiff's Exhibit No. 1, was received in evidence.) [90]

[Plaintiff's Exhibit No. 1—Map of Parcels. See original.]

The Court: It might be well to put that on an easel.

Mr. Landrum: May I approach the easel, your Honor?

The Court: Yes. We will move it around a little later, ladies and gentlemen, so that you can see it.

Mr. Monroe: How about putting north at the top?

The Court: The record shows that Mr. Sloane is in the court room now. Mr. Sloane, there was a map offered here, and all of the parties agreed to it, but you were not here and no one representing your client.

Mr. Sloane: That is acceptable. I ask your Honor's indulgence. I thought the opening hour was 10:00 o'clock.

The Court: There is some excuse the first day, but from now on there will not be any.

(Testimony of Carl A. Johnson)

I think you had better put the easel around in front so that the jury can see it.

Mr. Landrum: It is rather difficult to lift it over there, your Honor, but we will try it. It is heavy.

The Court: I hope you citizens of San Diego can get together in an attempt to get a new court room, in keeping with this great metropolis at the present time. [91]

Mr. Muir: May it please the court, the defendants would like to offer a map of the harbor of San Diego, if the government is agreeable.

The Court: The harbor as of what date?

Mr. Whelan: As of January, 1945.

Mr. Landrum: That is objected to, if your Honor please, on the ground and for the reason that it does not depict it as of the time in question. We have no objection if they have a map as of the time of the taking, none whatever, but this contains soundings and things of that kind as of 1945 and 1946.

The Court: The objection is sustained.

Mr. Muir: We would like to offer it simply for the shoreline and general topography of the area, not as to soundings.

The Court: Have there been any changes—

Mr. Landrum: If it is offered simply for the purpose of showing the surroundings there and the situation and not anything else, we don't object.

Mr. Whelan: There may have been a lot of changes in that South Bay area in the last two or three years. Counsel may not be quite as familiar with these facts as I am. It is principally a sounding map, as I see it.

The Court: I will take a look at it.

(Testimony of Carl A. Johnson)

Mr. Landrum: I renew the objection, if your Honor please. [92]

The Court: The ruling will stand. The objection is sustained.

Q. By Mr. Muir: Mr. Johnson, what is your business or occupation?

A. I am a distributor of petroleum products.

Q. What company? What refinery do you represent in this area?

A. The Sunset Oil Company.

Q. How long have you been engaged in that business?

A. Before the Sunset, I would say about 14 years.

Q. How long have you been engaged in the petroleum industry?

A. About 20 years.

Q. In connection with your distribution of petroleum, do you have to have any particular facilities for that purpose?

A. I have to have a bulk plant.

Q. When you refer to a bulk plant, what do you mean?

A. Your tanks and storage and headquarters, with your office, and a place for your trucks.

Q. The tanks are of a dimension about as high as this room and from the pillar to the wall in the back of the room?

A. I would say so. The tanks we have at the present location hold 20,000 gallons.

Q. In 1942, where was your bulk plant located? [93]

A. On Pacific Highway, directly across from Consolidated.

Q. Where is it now located?

A. On Main Street.

Q. Both places being in San Diego?

A. Yes, sir.

(Testimony of Carl A. Johnson)

Q. The present address is 1779 Main Street?

A. That is right.

Q. In the year 1942 and now, you and your wife, Pearl Johnson, were the owners of what is known as Parcel 9 in this litigation, is that correct?

A. That is right.

Q. I point out on this map, Plaintiff's Exhibit 1, the parcel indicated here in the sort of purplish or pinkish tone, dark pinkish tone, and ask if that indicates approximately the place where your land was and is located.

A. Yes.

Q. The map indicates Parcel 9 to be 1.02 acres, is that correct?

A. Yes, sir. It was approximately two acres, I think, the entire property.

Q. The parcel, though, known as 9, now under condemnation, is this portion, consisting of one acre?

A. That is right.

Q. When you referred to two acres, was there other [94] property you at that time owned?

A. Yes, where that ramp extends there. The entire block we owned.

Q. To the south, would you say? A. Yes.

Q. That is, south from the part indicated to 15th Street?

A. That is right. This dark line in between here is a 25-foot ramp that the government also took as a right-of-way from the ramp to the batching plant.

A Juror: Your Honor, may I inquire whether this is Pacific Highway there they are speaking of or Main Street?

The Witness: No. This is at National City.

(Testimony of Carl A. Johnson)

The Juror: This is at National City?

The Witness: Yes.

Q. By Mr. Muir: This property which we have been now discussing is the property which is the subject of this litigation, located in National City, is that right?

A. That is right.

The Court: All of this property, ladies and gentlemen, is in National City. I think, if you will withhold your inquiries, counsel will develop all of these factors by questions. They have prepared this case very carefully and have spent a lot of time on it, and you had better let them present it. Then, later on, if there is anything that you want [95] to inquire about, you may do so.

Q. By Mr. Muir: The property now that is known as Parcel 9, the subject of this litigation, is located between Cleveland Avenue and Harrison Street in National City, is that correct? A. Yes.

Q. Are you now the owner of the parcel of land which is indicated to the south, between Parcel 9 as indicated and 15th Street? A. No. I sold that in 1945.

Q. And to whom? A. To Dick Haas.

Q. Can you state the consideration?

Mr. Landrum: Just a moment, if the court please. That is objected to upon the ground and for the reason that it is improper as to time, the sale having taken place subsequent to the date of taking here, at least two or three years later, when conditions were entirely changed.

The Court: Sustained.

Q. By Mr. Muir: On this property, Mr. Johnson, Parcel 9, were there any improvements of any kind?

A. One building is all.

(Testimony of Carl A. Johnson)

Q. Describe the building and type of structure.

A. It was a former shed. It was about 15 by 22 or '3, made out of 2 by 4's and corrugated iron. [96]

Q. It was situated on Parcel 9? A. Yes.

Q. Can you give us the reasonable market value of that building as of November 10, 1942?

Mr. Landrum: That is objected to, if the court please, in that it attempts to give a valuation of only a portion of the entire whole, with no method of allocating that as against it all.

The Court: The objection is overruled.

Mr. Muir: You may answer.

The Witness: I would say it was worth about \$500.

Mr. Landrum: If your Honor please, I rise to ask whether or not your Honor has ruled that we are trying this case in accordance with the New Rules that say it will not be necessary, as I understand it, for me to take exceptions to your Honor's rulings.

The Court: Of course, the New Rules do not provide for exceptions but, for the purpose of appeal, you should preserve your record as you think you should preserve it. As far as I am concerned, either party may have an exception to any adverse ruling, without stating it, but I am not attempting to bind superior authority by that. You may encounter difficulties, if it is necessary to submit the matter to a superior authority.

Mr. Landrum: If your Honor please, may the record show, [97] then, that each side has an exception to any adverse ruling, without stating it?

The Court: It may so show as far as the court is concerned.

Mr. Monroe: That is agreeable to counsel.

(Testimony of Carl A. Johnson)

The Court: Do you all agree on that, gentlemen?

Mr. John M. Martin: So stipulated.

Mr. Muir: I so stipulate.

Mr. Landrum: If your Honor please, there may be some particular matter I would like to arise to take a particular exception to, outside of that.

The Court: As long as there are no arguments on the exceptions, you may do so, but I will not hear any arguments and no arguments on objections in the presence of the jury. I hope you all understand that rule, which is a rule of this court.

Q. By Mr. Muir: Mr. Johnson, what was the reasonable market value of this property, owned by you and Mrs. Johnson, of Parcel 9, on November 10, 1942?

Mr. Landrum: That is objected to, if the court please. He may state his opinion but he is asked now for a fact.

The Court: Overruled.

The Witness: Well, I base my value—

Mr. Landrum: Just a moment, if the court please. That is objected to as not responsive to the question. [98]

The Court: Overruled.

The Witness: I base the value of the property on when Tavares leased it from me, and they based their rental on their appraisal, is what they told me, my wife and I. When they took the property there, Mr. Bliss was paying me a hundred dollars a month rent, and they appraised the property—mama and I went in to see them—and they said they could only pay me \$40 a month. They appraised it at \$8,000 and established the rental at \$40, 6 per cent of \$8,000.

(Testimony of Carl A. Johnson)

Q. By Mr. Muir: In your opinion, the value, then, was reasonably the current market value of \$8,000 at that time?

A. Well, they are a big outfit. I believe they knew what they were doing.

Mr. Landrum: I don't believe, if your Honor please, that is responsive to the question. That is objected to.

The Court: Sustained.

Q. By Mr. Muir: Please state, Mr. Johnson, your opinion of the reasonable and fair market value of the property, of yourself and Mrs. Johnson, on November 10, 1942, that is, the land and improvements.

A. \$8,000.

Q. Referring now again to that property, can you tell us if there was a railroad track anywhere near that property and, if so, where? [99]

A. Right adjacent to it, on the ocean side, there was a spur track which was used by the cement works also for unloading carloads of cement.

Q. In other words, adjacent to it, at the point I am now indicating, just immediately to the west of the indicated portion of Parcel 9, you say there was a spur track?

A. That is right.

Q. Was that a track of the Santa Fe Railroad?

A. I don't know whether it was the San Diego & Arizona or Santa Fe.

Q. But it did service this property?

A. Yes; that is right.

Q. In and adjacent to this property were there other industrial units or residential property?

A. Other industrial units,

(Testimony of Carl A. Johnson)

Q. That is, wholesale firms and industrial manufacturing, is that right? A. Yes; that is correct.

Q. About how far would you say that the westerly line of your property was from the mean high tide line of the bay to the west?

A. Well, we used to have a pier there, with a pipeline going out and it was, it seemed like, at that particular point, before they started in work there, it wasn't only a couple of blocks. The pipeline ran out there half a mile out [100] in the ocean, where the barges could unload.

Q. That was an oil pipeline? A. Yes.

Q. In other words, oil barges could pull in through our harbor and unload through this to your property?

A. That is right. But the pipeline and pier were abandoned before any negotiations were taken up here.

Q. Before this litigation started?

A. Yes; that is right.

Mr. Muir: You may examine.

Cross Examination

By Mr. Landrum:

Q. Mr. Johnson, would you be good enough to tell us, so far as your recollection permits you, the date upon which that pipeline and pier to which you have referred was abandoned?

A. I would say it was at least a year prior to any negotiation.

Q. So, on the 10th day of November, 1942, there wasn't any pipeline and pier there at all?

A. No; that is right.

Q. Mr. Johnson, when did you purchase this land?

A. I think it was in February or March of 1942.

(Testimony of Carl A. Johnson)

Q. Who did you buy it from?

A. The Sunset Oil Company.

Q. On November 10, 1942, that property was leased to [101] someone, was it not?

A. That is right. [102]

Q. To only one person? A. No, two persons.

Q. Now, I understand you to say that you had a lease to Tavares; that is right, isn't it? A. That is right.

Q. Did you have a lease of a portion of it to someone else?

A. There was an overriding lease to a man by the name of Carl Bliss.

Q. What do you mean by an overriding lease?

A. I think the leases can be offered into evidence. I don't know too much about the leases, but, in other words, if at the time, as I understand, the Tavares were through with the property, then Lester Bliss could step over and take over for the balance of the term, or he could take it. In other words, Carl Bliss paid me \$35 a month rent for that privilege, and Tavares \$40.

Q. What I was trying to get was that very thing. Would you be good enough to tell us what your total income gross from that property was on November 10, 1942?

A. \$75.

Q. \$75 a month? A. Yes.

Q. That is gross? A. That's right. [103]

Q. And, of course, from that taxes and matters of that kind had to be deducted? A. That's right.

Q. In arriving at your conclusion with relation to the fair market value of this property, you have capitalized the income? A. What do you mean?

(Testimony of Carl A. Johnson)

Q. Well, you said something about 6 per cent, didn't you?
A. That is what Tavares told me.

Q. Well, how did you arrive at your \$8,000?

A. They arrived at it for me.

Q. Yes. So the value you have given to this jury and this court was a figure that Tavares gave you; is that right?
A. Correct.

Q. This property was about 1.02 acres; that is right, isn't it?
A. Yes.

Q. Are you familiar with that locality down there at National City?
A. Why, somewhat, yes.

Q. You have kept track of the land sales and what land was being sold for down there in 1942,—land like this?

A. No.

Q. Tell this court and jury whether you know of a [104] single parcel of 1.02 acres of land comparable and similar to this that was sold in the Village of National City, that was sold at any time before this for any such money as \$8,000. Do you know any, Mr. Johnson?

A. I am not in the real estate business.

Q. You don't know any, do you?
A. No.

Q. That is correct, isn't it?

A. No, I am not in the real estate business.

Q. Well, then, Mr. Johnson, just one more question, please. You don't know of any such sale, do you?

A. No.

Mr. Landrum: Thank you, sir. That is all.

Mr. Muir: May it please the court, may I inquire further on direct in regard to these leases?

The Court: Yes.

(Testimony of Carl A. Johnson)

Redirect Examination

By Mr. Muir :

Q. Mr. Johnson, you were asked about a lease with the Tavares Construction Company. I show you now a writing headed "Indenture of Lease Entered Into," according to the document on June 5, 1942, by and between Carl A. Johnson and Pearl Johnson, as lessors, as therein described, and the Tavares Construction Company, Inc., a California corporation, as lessee, and ask you if the signatures on the last page are [105] those of yourself and Mrs. Johnson. A. Yes.

Q. Did anyone for Tavares sign the same in your presence?

A. No, I don't believe so. They took it into another room, as I recollect it, to sign it.

The Court: Are these leases disputed, gentlemen?

Mr. Landrum: No, your Honor.

The Court: Then why don't you admit them and save a lot of time?

Mr. Muir: I would like to offer on behalf of the defendants Johnson the indenture of lease between Carl A. Johnson and Pearl Johnson with the Tavares Construction Company, dated June 5, 1942.

Secondly, an indenture of lease dated June 17, 1942, between Carl A. Johnson and Pearl Johnson, as lessors, and Carl G. Bliss.

Thirdly, an assignment of lease dated March 17, 1943, by Carl G. Bliss to the Defense Plant Corporation, assigning the Bliss lease.

The Court: What is the date of that?

Mr. Muir: March 17, 1943.

(Testimony of Carl A. Johnson)

Mr. Landrum: In that connection, if the court please, will counsel stipulate with me that the other lease was also assigned to the Defense Plant Corporation, an agency of the [106] government?

Mr. Muir: I have no knowledge, but if Mr. Martin states that they so did, why, I will so stipulate.

The Court: That is the Tavares lease?

Mr. Muir: Yes, your Honor.

The Clerk: Defendants' Exhibits A, B and C.

(The documents referred to were marked Defendants Johnson Exhibits A and B and C, and were received in evidence.)

[Defendants' Exhibits A, B and C—Leases pertaining to interests of defendants other than appellants. See originals.]

Mr. John M. Martin: If the court please, I have not been permitted to examine the exhibit that is offered, and I would have to see it before I could answer intelligently.

Mr. Landrum: All right. May I show it to him, your Honor?

The Court: Yes.

Mr. Landrum: If your Honor please, we don't seem to know definitely whether that was assigned to the government or not, so I will just go along without that.

Q. By Mr. Muir: Mr. Johnson, you moved from the location you had on Pacific Highway opposite the main entrance, the former main entrance of Consolidated. Can you tell us why you had to move out of that location?

A. Well, the Consolidated—

Mr. Landrum: Just a moment. That is objected to, if the court please. [107]

(Testimony of Carl A. Johnson)

Mr. Muir: I think it is preliminary to showing why he acquired this property.

The Court: Overruled.

The Witness: The Consolidated wanted the property, as I understood, and they kept insisting that they buy it, and, in fact, when they put the barricades down there they caused us a lot of trouble and, you know, the Army went in and put the barricades in, and it was very inconvenient. So, in fact, the National Guard, or the Army, or whoever it was that was there, notified us that they were going to condemn the property anyway as a hazard to the Consolidated Aircraft. Then I went to the Sunset Oil Company, and I knew of no other location—

Mr. Landrum: Just a moment. That is all objected to, if your Honor please.

The Court: Yes, sustained. I don't think the reasons in extenso are material.

Q. By Mr. Muir: You then moved your plant from the Pacific Highway location down to the National City area? A. No.

Q. Down to the Main Street area?

A. Yes, to the Main Street. I bought the plant from the Sunset Oil Company to move in there, and when Lester Bliss decided or he insisted he had to have the ground for the batch plant, why, we tried to arrange it to leave enough [108] for a bulk plant in the two vacant spots that were there, but after we went down and saw all the cement flying around, it wasn't suitable as a bulk plant, and we finally located on Main Street.

(Testimony of Carl A. Johnson)

Q. In other words, you contemplated putting your bulk plant to the south side on parcel 9 on each side of the ramp that is indicated there? A. That is right.

Q. Now, government counsel asked you the amount you were receiving from this property, and you stated you were receiving \$40 from the Tavares Construction Company on that lease? A. Yes.

Q. And \$35 from the Bliss lease?

A. That's right.

Q. A total of \$75 a month? A. That's right.

Mr. Muir: That is all.

Cross Examination

By Mr. Landrum:

Q. I just wanted to ask one question to make sure: Did the Bliss lease cover only the parcel we are here concerned with of 1.02 acres, or did it cover more land?

A. It covered the office space in the rear.

Q. So the answer is the Bliss lease covered more land [109] than we are concerned with here?

A. That's right.

Q. Did the Tavares lease cover more land than we are concerned with here? A. No.

Q. So you were getting \$40 a month for the land which we are here concerned with, and \$35 for this land we are here concerned with, together with some other land? A. That's right.

Mr. Landrum: Thank you, sir. That is all.

The Court: That is all.

(Witness excused.)

PAUL WARD,

called as a witness by and on behalf of the defendants Carl A. Johnson and Pearl Johnson, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: Will you state your name, please?

The Witness: Paul Ward, W-a-r-d.

By Mr. Muir:

Q. Please state your name. A. Paul Ward.

Q. What is your business, profession or occupation?

A. I am a State inheritance tax appraiser.

Q. For what State? [110]

A. The State of California.

Q. How long have you held that position?

A. Since 1929.

Q. You have an office in the City of San Diego, do you? A. Yes, sir.

Q. From 1929 you have been appraising property in connection with your official duties as such appraiser?

A. I have.

Q. Have you had any experience in appraising property, other than as a State inheritance tax appraiser?

A. Yes, I appraised property for private individuals. I am an appraiser for the Businessmen's Insurance Company of Kansas City, Missouri. I have appraised for the Superior Court. I have appraised in bankruptcy proceedings, and I have appraised considerably for private individuals.

Q. You have been making such appraisals ever since 1929 up until now? A. Yes, sir.

Q. You are on this date still an official State inheritance tax appraiser for the State of California?

A. Yes, sir.

(Testimony of Paul Ward)

Q. Can you tell us how many other such appraisers there are in San Diego?

A. There are three in San Diego County.

Q. That is yourself, Mr. Muller, and Mr. Hotchkiss? [111]

A. Yes, sir.

Q. You three are the official appraisers for the State of California in respect to inheritance tax matters for San Diego County?

A. Yes.

Q. Have you a license as a real estate broker?

A. Yes, sir, I am a licensed real estate broker; have been for about the past 30 years.

Q. In the year 1942, in connection with your official duties as an appraiser and as an appraiser for private interests, did you have an occasion to make any appraisals of property in the area in National City which has been more particularly described on Plaintiff's Exhibit 1, being in National City near Harrison Street, which is adjacent to the water front there, at about 15th Street intersecting with Harrison Street?

A. I have appraised property many times, mostly residence property, in that section. I have been past this property, of course, and I am very familiar with property in that section.

Q. Have you made any appraisals of industrial property in that area in the year 1942?

A. No, sir. It hasn't happened that in any estate I have had any industrial property that is comparable to this property, in my opinion. [112]

Q. In connection with your appraisals and official duties as State inheritance tax appraiser, are you familiar with industrial values in that area?

A. Yes, I am.

(Testimony of Paul Ward)

Q. Mr. Ward, are you familiar with the legal definition of what is known as the market value of land?

A. Yes.

Q. Would you state what you understand the reasonable market value term to mean?

A. The market value is the highest price, expressed in terms of money, which property will bring if exposed for sale on the open market, with a reasonable time to find a purchaser, buying with the full knowledge of all the uses and purposes for which the property is adapted and for which it is capable of being used.

Q. Now, I will call your attention to parcel 9, as indicated on Plaintiff's Exhibit 1, which is this portion (indicating), and ask you if you have made an appraisal of this property as of November 10, 1942?

A. Yes, sir.

Q. More particularly, have you made an appraisal of the fee title value of Carl A. Johnson and Pearl Johnson, as owners of this property?

A. Yes.

Q. What, in your opinion, is the reasonable market [113] value on November 10, 1942 of the land of the Johnsons, as indicated?

Mr. Landrum: That is objected to as no foundation laid.

The Court: Overruled.

The Witness: My value of the land, the market value of the land, is \$7,765.62.

Q. By Mr. Muir: Can you tell us how you arrived at this opinion of value?

A. I considered the property as industrial and commercial property, property suitable, most suitable, the highest and best use of the property being for industry,

(Testimony of Paul Ward)

industrial plants, warehouses or gas and oil depots, such as Mr. Johnson had the property used for. I considered property of this type on the market, the demand, the supply, the scarcity of comparable property the same as this, with the same features, the demand, and, in my opinion, in that comparison of other property I considered this property worth 17½ cents a square foot. The property, the total area of the subject property, is 43,375 square feet, slightly over one acre, and by valuing it at 17½ cents a square foot, it totaled a value of \$7,765.62 for the land.

Q. On this land did you make an appraisal of the corrugated iron building of approximately the dimension of 27 by 15 feet?

A. Yes, sir. In my opinion, the building was worth [114] on the day of taking, November 10, 1942, 75 cents a square foot, or the sum of \$300.

Q. Then, in your opinion, the market value of this property on the date of taking would amount to \$8,065.62; is that correct?

A. Yes, sir, that is the total appraised value.

Q. Now, in further arriving at your opinion of the reasonable market value, the fair market value of this property, on the date of taking, did you take into consideration the leases that the Johnsons had on this property with anyone?

A. Yes, sir, I considered the leases.

Q. More particularly, did you consider the lease between the Johnsons and the Tavares Construction Company?

A. Yes, sir, I gave most consideration to the lease there of \$40 a month.

Q. According to that lease, it appears that the lease was to run for a term of five years at a rental of \$40 a

(Testimony of Paul Ward)

month, a total rental in excess of \$4,000 from this lease. Can you tell us as an expert the computation of the value of land in comparison to the rental?

A. Yes, sir. In capitalizing upon the rental income of the property, the rent of \$40 a month, although there was a slight increase in a prorated portion of the Bliss rent, but basing our capitalization of the rental income on the [115] basis of \$40 a month, we would then have a total yearly rental of \$480. In checking the taxes, the prorate portion of the taxes on this subject property, it would amount to less than \$80, and I deducted the \$80 so as to cover it entirely, be sure to cover it, and took a net value of \$400 per year. Capitalizing on \$400 per year net gives a valuation of 20 times \$400 or \$8,000. In other words, 5 per cent net on \$8,000 gives the \$400 per year income.

Q. Also, in connection with your opinion of value, did you consider the fact that this property was adjacent, immediately adjacent to the water front?

A. Yes, sir. It is close to—at the date of taking it was close to the water front and what used to be the wharfage there of the National City wharf. I considered that, and I would like to add also that in consideration of this lease, while we are on it, that that was a very low lease. That is not the highest adequate return for the highest and best use of this property. This property, as I considered it, industrial and commercial property close to the water front and close to trackage, really would justify an income of \$75 a month. That \$75 is merely considered as a fair rental for the highest and best use. On that basis we would have \$900 a year income. We would have an expense of taxes, all taxes and all expenses of approximately \$80 a year, which would give us an

(Testimony of Paul Ward)

income of \$820 a month net—I mean, [116] \$820 a year net income. That income would have been a fair income for this kind of property, which showed 10 per cent on a valuation of \$8,200.

Q. Also, in arriving at your opinion of the value of this property on the date of taking, did you consider sales of land immediately adjacent, and in that immediate area?

A. I didn't have any sales of property adjacent or in that vicinity. I had to compare it with property of this nature in the location and section near the water front at the foot of Main, Sigsbee and Beardsley Streets, which is the section north of the A B C Brewery and down at the bay front, water front.

The Court: How far is that in lineal measurement from the site in question?

The Witness: Your Honor, that is quite a distance in miles. But I might add that a great many of the purchasers and people that needed property of this nature were forced to go to National City and go quite a distance south to get this kind of property, because at this time the property was not available in this section that I have just described, which is in the southwestern portion of San Diego.

The Court: Were the harbor facilities suitable for commerce in that immediate vicinity at the time of the taking?

The Witness: This property, the subject property, was [117] about the nearest they could get to the facilities, and so forth, that they really wanted, in the property that I am trying to compare it with; the facilities for trackage and nearness to the tidelands, although there was

(Testimony of Paul Ward)

very little use of this wharfage or this wharf at National City, but it was there. And also, the National City industrial concerns and automobile men that needed warehouses, and people of that classification, were really buying and wanted property in this location near to National City.

The Court: What was the water frontage of the subject property?

The Witness: Well, they had to cross over a block or two in order to get to the National City wharf, and to get to the tidelands, but the property had good trackage and good street frontage, Cleveland Street, and was in an industrial center, the National City industrial center.

The Court: Approximately how far would you say the property line of the subject property was at the date of taking from the ride line of the bay?

The Witness: My estimation on that distance would be approximately 100 yards.

Q. By Mr. Muir: Then in conclusion, your opinion of the value would be approximately the figure of \$8,000? It was a little more than that, but that figure would be a fair amount to state, that is \$8,000? [118]

A. Yes, sir. I think the fair market value is \$8,000.

Mr. Muir: That is all. You may cross-examine.

Cross-Examination

By Mr. Landrum:

Q. Mr. Ward, the parcel of land to which you have been referring is that parcel on Plaintiff's Exhibit 1 to which I am now pointing with this ruler, is it not? Will you step down? Have you seen this?

A. That is the property, yes, sir. Just let me have a good look at that map.

(Testimony of Paul Ward)

The Court: That map does not purport to be drawn to scale, does it?

Mr. Landrum: I think it is to scale, your Honor.

The Court: Is there a legend on it?

Mr. Landrum: Sir?

The Court: Is there a legend on it?

Mr. Landrum: No, your Honor, there isn't.

The Witness: You are speaking of the red portion, of the property here (indicating)?

Q. By Mr. Landrum: Yes. That is it, isn't it?

A. Yes, sir.

Q. Did you value that as water front property?

A. No, sir, I valued that property as industrial and commercial property. [119]

Q. As a matter of fact, Mr. Ward, what was right in here on this map (indicating), do you know?

A. Yes, sir. Santa Fe lands, Santa Fe terminal lands.

Q. Was there a street in there?

A. There was Harrison—pardon me. Will you point to the location again?

Q. I am not so familiar with this map. You point out where that street is, will you?

A. Harrison Street runs just to the west of this property. This is north up here, this is east. Harrison Street is the street right in here (indicating), and that is the street. Although it was used only for track or trackage, still it is the street in there, and the Santa Fe comes just to the west of the spur trackage.

Q. Yes, sir. That is what I was trying to get at. As a matter of fact, this land is not adjacent to the water

(Testimony of Paul Ward)

front, but it is across the street, and then all this land is between it and the water front, isn't it?

A. Not at the date of taking, the tideland was not far from the—not far west from the Santa Fe main line.

Mr. Landrum: Yes, sir. Could I have that exhibit, please, the lease?

(The document was handed to counsel.)

Q. By Mr. Landrum: In arriving at your conclusion with relation to the fair market value of this property, did you [120] take into consideration the leases which were upon it?

A. Yes, sir, I took the leases, and I also took what I considered would be a fair lease for a fair rental for property of this nature.

Q. Did you say that the Tavares lease was only a five-year lease?

A. I did not have the exact time and date. I used only the amounts on the Tavares lease, at \$40 per month.

Q. In arriving at your conclusion by the method of capitalization of income, do you not think it would be rather important for you to know how long that income might be derived?

A. Well, it couldn't last longer than at the date of taking, but I based it on \$40 a month anyway.

Q. For how long? For how long?

A. For the length of the Tavares lease.

Q. What was the length of the Tavares lease?

A. I could not answer that question, sir.

Q. Mr. Ward, if you don't know how long the lease was and you say that you based it on the length of the lease, would you tell us again just how you figured it?

(Testimony of Paul Ward)

A. I used that only as a factor, but my main contention or my main capitalization of income, which I think is important in fairness, is what is the property's highest and best use and what property income would this property bring. [121]

Q. Then you are not basing it on capitalization of income; you are basing it on what the income should be. That is what you say, isn't it? [122]

A. I gave my testimony both. I didn't want to be confused.

Q. I noticed, however, that, when you found these actual figures of \$480 a year, you used 5 per cent?

A. Yes, sir.

Q. But, when you took another figure, you used 10 per cent. Now, tell us isn't it a fact that the risk in property of this kind actually should require a capitalization at 10 per cent rather than 5?

A. No, sir; not when it is being used such as a batching plant or such as the Tavares used it for, which is not a true, fair income on the property.

Q. I want to show you the Tavares lease. As a matter of fact, that lease runs for about 20 years, doesn't it, with its extensions?

A. I did understand that there was an option, it is true, on the property, on the lease.

Q. Now, then, Mr. Ward, in arriving at your conclusion from the method of capitalization, or what we call the economic approach, you figured that land was going to be rented continuously at this rate of income forever, didn't you?

A. No, sir; not at the \$40 a month income.

(Testimony of Paul Ward)

Q. Well, tell us exactly how you capitalized that. How did you arrive at any such figure as you have given us by a [123] capitalization of \$480 a year?

A. My capitalization of \$480 a year is on the basis of the \$40 a month, which was the Tavares rental. I also capitalized it and considered it for my own valuation, which I think is fair, of what would be and should be considered as a fair rental on the highest and best use for that land.

Q. Now, Mr. Ward, when you use that method of economic approach, it is necessary for you to reduce that income which you may receive in the future to its present worth, is it not?

A. Not in the assumption as to using it as a factor for a valuation.

Q. As a matter of fact, if that is a 20-year lease, 20 years from the date of it—

Mr. Muir: May it please your Honor, I think that is a misstatement of the terms of the lease. It is a five-year lease.

Mr. Landrum: I will be very happy, your Honor, to try to find out what it is.

Q. I call your attention, Mr. Ward, to paragraph 2. Does it not read, "The term of this lease shall commence on the 5th day of June, 1942, and it shall extend for a term of five years, ending the 4th day of June, 1947, with the option hereby granted for an additional term of five years. This lease shall automatically be renewed at the expiration of the original five years of the lease at least 90 days be- [124] fore the expiration prior to the termination of the lease the corporation shall notify the lessor, in writing, by registered mail, that it does not

(Testimony of Paul Ward)

intend to extend the lease." As I understand, it is a five-year lease, with a five-year renewal clause, is it not?

The Court: It speaks for itself.

Mr. Landrum: Yes, sir.

Q. Then, you say that 10 years from that date, he will receive \$40 a month, or \$480 the 10th year? That is right, isn't it, Mr. Ward?

The Court: Just a moment. Are you going to do the testifying?

Mr. Landrum: No, your Honor.

The Court: And the witness didn't answer audibly. He shook his head.

Mr. Landrum: What is the answer?

The Witness: My answer is that five or 10 years on that lease, or the option of five years, should be considered as a procedure in valuing the land, and I considered it and gave the figure on that basis.

Q. By Mr. Landrum; And, in order for you to arrive at that figure, you had to conclude that 10 years from now under that lease he would get an income of \$480, didn't you?

A. That is the basis I took; yes, sir.

Q. Now, if you are going to get \$480 10 years from now, [125] what is that \$480 worth today, if you take it and invest it in something else?

Mr. Muir: I object to that as argumentative, your Honor.

The Court: Yes; I think it is. Sustained.

Mr. Landrum: I beg your Honor's pardon.

Q. I understood you to say, in your opinion, this was industrial property.

(Testimony of Paul Ward)

The Court: Mr. Ward, answer audibly so that the reporter can understand you.

The Witness: Yes, sir; industrial and commercial.

Q. By Mr. Landrum: Will you tell us whether or not in your investigation you were able to find a sale of a single piece of industrial property, in the city of National City, where it was sold for as much as even \$3,000 an acre, in the city of National City?

A. I haven't any sale as of the date of death—I mean as of the date of taking.

Q. You are correct. I asked you in the city of National City. You referred to a sale here in the city of San Diego, didn't you? Did you find a single sale in the city of National City for as much as \$2,000 an acre, please, sir?

A. I haven't any sale, as I testified, in National City, of comparable property. [126]

Q. Did you find a single sale in the city of National City for as much as \$1,500 an acre?

Mr. Muir: I think that is argumentative. He stated he has no sale. Therefore, it is a repetition of counsel's question.

The Court: Probably it is. You have got to allow for the zeal of counsel, however.

Mr. Muir: Yes, sir; thank you.

Q. By Mr. Landrum: Did you make an allowance for the fact that the government of the United States was the owner, by assignment, of this lease? Did you know that the government owned this and had a 10-year lease on this property?

A. In my valuation, it was not considered.

(Testimony of Paul Ward)

Q. Don't you think that a buyer willing but not compelled to buy, discussing the matter with a seller willing but not compelled to sell—that he would say to the seller, "Mr. Seller, you have got a lease on this for 10 years, have you not?" Don't you think they would talk about that?

A. As a broker, if I have a buyer and I could put the testimony in—a buyer that would—

Q. That isn't what I asked you—

The Court: Now, we don't permit counsel to interrupt a witness. Don't interrupt the witness. I don't want that from any counsel in the case. [127]

Mr. Landrum: Thank you. That is all.

Mr. Muir: May I inquire further, your Honor?

The Court: Yes.

Redirect Examination

By Mr. Muir:

Q. Mr. Ward, you were asked by government counsel about the economic theory of capitalization. Does it make any difference whether a lease is to run from one to 20 years in arriving at your capitalization?

A. Not in my considering it as a factor in arriving at my valuation.

Q. Secondly, you were asked in regard to the rental running for 10 years. Can you tell us the period of time when rental will equal or should equal, according to proper capitalization, the value of the land? In other words, if property is rented for a continuous period, how long would that period have to be at a certain rental to reach the point

(Testimony of Paul Ward)

where it would equal, that is, in gross receipts of rental, the fair market value of the land?

A. It would be the length of time to arrive at my valuation, that I arrived at, if I understand the question. But, of course, if I was using that method, I would then take the present value of that money, of that rental, which I have in my office the tables of for that purpose.

Mr. Muir: That is all. [128]

We will call Mr. Haas.

RICHARD G. HAAS

called as a witness by and on behalf of the defendants Carl Johnson and Pearl Johnson, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Richard G. Haas.

Direct Examination

By Mr. Muir:

Q. Please state your name.

A. Richard G. Haas.

Q. What is your residence address?

A. La Mesa.

Q. What is your business or occupation or profession?

A. Automobile business in National City.

Q. How long have you resided in San Diego County?

A. Seven years.

Q. In 1942, were you in business in National City?

A. Yes.

Q. In 1942, were you then interested in buying land?

A. Yes; I was.

Q. I direct your attention to Plaintiff's Exhibit 1 and call your attention particularly to Parcel 9, which is the

(Testimony of Richard G. Haas)

property of Carl Johnson and his wife, Pearl Johnson, and ask you if, in 1942, you were interested in buying that par- [129] ticular parcel of land.

Mr. Landrum: That is objected to, if the court please.

The Court: Sustained. You didn't state the grounds of your objection. You should do so in this jurisdiction.

Mr. Landrum: I was trying to keep from arguing the objection, your Honor.

The Court: No; that isn't arguing the objection. I won't permit argument but I do want a statement of the reasons counsel has for objecting to a question. Otherwise, the record doesn't show what the objection is. That question is not proper on direct examination. The question doesn't disclose what you expect to elicit.

Q. By Mr. Muir: In 1942, Mr. Haas, did you make an offer to Mr. Johnson for the purchase of Parcel 9?

Mr. Landrum: That is objected to as incompetent, irrelevant and immaterial, an offer.

The Court: Sustained.

Q. By Mr. Muir: Were you, in 1942, ready, able and willing, to buy Parcel 9?

Mr. Landrum: That is objected to upon the same grounds, if your Honor please.

The Court: Of course, that incorporates features that may or may not be within the rule as to a willing buyer and a willing purchaser. There is nothing in the question that tells the reasons why he was in the market. [130]

Mr. Landrum: The question was whether he had the money to buy it.

The Court: I told you not to argue objections. The first opportunity, you overstepped. The ruling will stand.

(Testimony of Richard G. Haas)

Q. By Mr. Muir: Mr. Haas, were you interested in this Parcel 9, in 1942, for your own acquisition?

A. Yes.

Mr. Landrum: That is objected to. That is immaterial, if your Honor please.

The Court: Overruled.

Q. By Mr. Muir: Could you tell us for what purpose you desired the land?

A. At that time I was entering into the trucking business or construction business and I needed that type of property as headquarters for storing equipment.

Q. Did you at that time understand that Mr. Johnson and his wife also owned the portion to the south up to 15th Street? A. I did.

Q. That is a parcel of land consisting of about two acres? A. That is right; and I later bought that.

Q. You bought the southern half of his parcel of land?

A. Yes, sir; that is right.

Q. In other words, all that portion to the south up to [131] 15th Street, south of the portion indicated as Parcel 9, you are now the owner of?

A. That is right.

Q. From whom did you acquire it?

A. I bought it from Johnson and Mrs. Johnson.

Q. How much did you pay for it?

Mr. Landrum: That is objected to, if the court please. It is indefinite as to time.

The Court: Sustained for that reason.

Q. By Mr. Muir: When did you buy this property, Mr. Haas? A. In November, 1944.

Q. What was the price you paid?

(Testimony of Richard G. Haas)

Mr. Landrum: That is objected to, if the court please. It is too remote.

The Court: Sustained.

Q. By Mr. Muir: In 1942, did you offer to buy this property from Mr. Johnson and his wife?

Mr. Landrum: That is objected to as indefinite as to time and immaterial.

The Court: Sustained.

Q. By Mr. Muir: Did you at any time in 1942 offer Mr. Johnson to buy his property, that is, all of the southern portion that you purchased later in 1944?

A. I did. [132]

Q. Was that on or about November 10, 1942, or previous thereto? A. It was about that time.

Q. At that time can you state what you offered Mr. Johnson for the property?

Mr. Landrum: That is objected to, if the court please, as immaterial and incompetent.

The Court: Will you read the question?

(Question read by the reporter.)

The Court: You say it was about that time, Mr. Haas. Can you give the time a little more definitely with respect to that date, November 10, 1942?

The Witness: I would say that it was somewhere before November 10th; probably July or August.

The Court: The objection is overruled. You may answer the question. Will you read the question?

(Question read by the reporter.)

Mr. Landrum: I renew the objection, if your Honor please, on the ground it is incompetent and another parcel of land.

The Court: The objection is overruled.

(Testimony of Richard G. Haas)

The Witness: I offered Mr. Johnson \$7,000 for the property, and at that time I didn't buy the property but I leased it from that period to November, 1944, at which time I paid him \$7,000. [133]

Q. By Mr. Muir: At the time you indicated in 1942, were you then able to pay the consideration of \$7,000?

A. I was.

Q. At or about that time, did you offer Mr. Johnson to buy Parcel 9, which is the portion to the north of the part you did buy?

A. We talked about that. But at that time I talked to him about buying the southern part. I talked to him about the north portion with the south portion and, when I purchased the south portion, I took an option from Mr. Johnson on the north portion when and if it was returned to him from the present occupants, at a price—

Mr. Landrum: Just a moment. If the court please, that is objected to.

The Court: Overruled.

Q. By Mr. Muir: At the time you purchased the southern half of the total property then owned by Mr. Johnson and his wife, did you then offer to buy the north half? A. I did.

Q. Can you state how much you offered at that time?

Mr. Landrum: That is objected to, if the court please, as incompetent.

The Court: Sustained.

Mr. Muir: That is all. You may examine.

Mr. Landrum: Nothing further. No cross examination. [134]

Mr. Muir: The Johnsons rest, your Honor.

The Court: Ladies and gentlemen, we will take a recess for a few minutes. Remember the admonition which I gave you yesterday and keep its terms inviolate. I wish you would occupy the jury room, ladies and gentlemen. It is for your convenience and it is better than circulating in the halls.

(Short recess.)

The Court: Let the record show all are present. Proceed.

Mr. Monroe: Is the National City case next, your Honor?

The Court: Very well. It is immaterial to me whether you or Mr. Sloane proceed but, if you have agreed among yourselves, you may proceed.

Mr. Monroe: May it please the court, and you members of the jury, together with Mr. Ratelle and Messrs. Campbell and Campbell, we represent National City. The lands which are involved in this action comprise something a little short of a hundred acres, a matter of, I think, 96 and a fraction acres, covering this area, with the exception of this little triangular piece marked as "4," with which we are not concerned in this action. These lands are what are ordinarily referred to as tidelands, lands which originally were owned by the State of California and which, by acts of the Legislature from time to time, have been vested in various California cities, as the tidelands were vested in San Diego. [135] The tidelands, by act of Legislature, were vested in National City for public purposes, navigation, commerce and fishing, which lands, as they were held by the cities, are subject to being leased for certain purposes while in the control of the cities, and not subject to sale to private individuals. I mention that feature as indicating, as it will later, some little difficulty

that will have to be met in the course of testimony in determining the market value.

In this action these lands, which comprise not only the shore but the tidelands running out into and including the submerged lands up to the bulk head line, are taken by the United States in this proceeding. They become the property of the United States.

The only subject with which you and I are concerned in the course of this trial is the amount to be awarded to National City as compensation, or, as it is put in the statute, just compensation, for the taking of these lands owned by the city.

The law furnishes us in a case of this kind with a test. Reference has been made to that test in the testimony that has already gone before you. The law considers that just compensation is what is considered as the fair market value of the property. In other words, what can you reasonably sell it for as of the date of taking, and that date will be fixed for you by the court as we proceed. And so we find [136] ourselves faced by the necessity in this case of proving what is the fair market value of this tract of land, which includes the entire contiguous area and includes the portion of the land which is the submerged land running out to the bulk head line.

Obviously, in arriving at that assumption, we have to make several assumptions. We have to assume the sale value of land which, prior to the time of the date of taking, could not be sold. It is our purpose merely in this action, in so far as the evidence introduced before you is concerned, to endeavor to show what we believe is the fair value of that land.

We believe that the overall value of the property taken from National City, taking into consideration its peculiar

uses and taking into consideration all of the facts concerned with this tideland, and that the entire tideland all around the Bay of San Diego is now occupied, and that it will fairly develop, is worth an over-all price of approximately \$10,000 per acre. We will introduce evidence to that effect. I thank you. Mr. Eisenman, will you come forward, please?

T. W. EISENMAN

called as a witness by and on behalf of the defendant National City, having been first duly sworn, was examined and testified as follows:

The Clerk: Please state your name. [137]

The Witness: T. W. Eisenman.

Direct Examination

By Mr. Monroe:

Q. Won't you please state your name for the jury?

A. T. W. Eisenman.

Q. Where do you live, Mr. Eisenman?

A. I live in Chula Vista.

Q. What is your business or profession?

A. My business is an engineer.

Q. Just briefly give us your experience in that business, Mr. Eisenman.

A. Well, I spent practically my entire life in the profession. The last 10 or 12 years has been in connection with the construction industry.

The Court: Mr. Eisenman, will you raise your voice a little, please, so we can hear you?

The Witness: In the last 10 years, my endeavors have been in connection with the construction industry. Prior to that, I was associated with land surveys and other phases of the engineer profession.

(Testimony of T. W. Eisenman)

Q. By Mr. Monroe: By whom are you employed?

A. At the present time I am employed by Concrete Ship Constructors.

Q. And how long have you been associated with that organization? [138]

A. Since December, 1941.

Q. And that organization generally consists of what various entities?

A. The Tavares Construction Company, Elliot, Stroud-Seabrook and C. M. Elliot.

Q. What generally have been your duties in connection with your service to that company?

A. Well, among my duties, one has been the construction of the shipyard proper, the overseeing of the work and providing the estimates and seeing that sufficient money was available for the construction and the problems in connection with the land.

Q. In connection with your duties, you have become familiar with what we call the subject property, the property that is being taken in this action?

A. Yes; I am familiar with it.

Q. I have particularly in mind in the questions I will ask you concerning the property the property which is designated in this suit as Area A and also property that is designated as Parcels 1 to 8 inclusive, except for the parcel known as Parcel 4. Now, are you generally familiar with that bunch of land?

A. I am.

Q. And do those parcels form a contiguous area?

A. Yes; they do. [139]

The Court: Mr. Monroe, are you going into Parcels 10 and 11?

Mr. Monroe: No, sir. We are not interested in that. In that connection, your Honor, I am making this inquiry

(Testimony of T. W. Eisenman)

at this time in the hope of saving time. There has been certain general testimony that has been offered by the other parties to this action. May it be considered that any testimony, of a general nature, that has been offered, we may adopt in so far as applicable to our case, without the necessity of again proving the same thing?

Mr. Landrum: There is no objection to that, your Honor.

Mr. John M. Martin: So stipulated and understood on behalf of my clients.

Mr. Muir: So stipulated, your Honor.

Mr. Sloane: So stipulated on behalf of the San Francisco Bridge Company.

The Court: So ordered as to all.

Q. By Mr. Monroe: I want to show you first, Mr. Eisenman, a map purporting to be a geological map of San Diego Bay, and upon which there has been marked, in pencil, or in pen, the words "Subject Properties," with an arrow pointing. I will ask you whether or not that map correctly shows the general location of the area that we are talking about.

A. Well, generally, yes. But the property happens to be somewhat south of where the arrow is pointing. [140]

Q. Let's mark that, if you will, please. Let me hand you something to mark it on.

The Court: Mark it on the bench, if you wish.

Q. By Mr. Monroe: With a pen here, will you correct or sort of designate, so it will be plain, where, in your opinion, the subject properties lie?

A. I am marking the north line of the property, which is approximately west of 13th Street of National City, and the south line of the property, which is approximately

(Testimony of T. W. Eisenman)

west of 19th Street, National City. Then the bulk head line runs out approximately a thousand feet, or 1,500 feet, rather, from the mean high tide line as shown on this map.

The Court: You have put a cross on the rectangles of the diagram?

The Witness: Yes, sir.

Mr. Monroe: I will offer the map as National City's exhibit.

Mr. Landrum: No objection.

The Court: So ordered.

(The map referred to was received in evidence and marked defendant National City's Exhibit No. D.)

[Defendants' Exhibit D—Map. See original.]

Mr. Monroe: And might I at this time show it to the jury, so that they may get the general location before we proceed?

Mr. Landrum: It hasn't been marked as an exhibit, your [141] Honor.

The Court: It may be marked now and you may show it to the jury.

The Clerk: Defendant's Exhibit D.

(Map exhibited to jury.)

The Court: Apparently, the jury has inspected the map.

Q. By Mr. Monroe: Mr. Eisenman, I will show you another map, which shows a colored area and also shows adjacent streets, railroad yards and whatnot, and I will ask you if, in your opinion, that is a correct map of the subject area, showing the adjacent streets and blocks.

A. It correctly shows the surrounding country. It doesn't display Parcel A, as I understand it. Parcel A, as

(Testimony of T. W. Eisenman)

I understand it, goes westerly from this point here rather than down to this point.

Q. In other words, you have pointed to a line north of that area, other than the area in question?

A. Yes.

Q. Suppose, then, that we mark the northerly boundary of the subject property.

A. In marking this, it is only approximate because I don't know the scale of this.

Mr. Monroe: I am just offering it for approximate location.

The Witness: This doesn't seem to do the work. I will put an "X" in the yellow portion of this map that does not [142] apply to Parcel A, as I understand it.

Q. By Mr. Monroe: So that the area, the subject area, is all south of the line that you have marked and the "X" that you have marked in red pencil?

A. That is correct.

Mr. Monroe: We will offer this map as the National City's next exhibit. I believe it is large enough so that we can just put it on the board, your Honor.

Mr. Landrum: No objection, your Honor, but I would like to have it marked and numbered so that I can keep my record. Is that Defendant's Exhibit 2?

The Clerk: Defendant's Exhibit E.

The Court: Is that lettering satisfactory, gentlemen?

Mr. Landrum: That is all right.

The Court: So ordered. [143]

[Defendants' Exhibit E—Map. See original.]

(Testimony of T. W. Eisenman)

Q. By Mr. Monroe: I will hand you, Mr. Eisenman, another map which has been shown counsel, and which I wish you would just explain to the court what it is.

A. This plat was prepared at my direction, at the instruction of Judge Haynes in the State Court, to be used in connection with a rent suit. It shows the property in the various areas, wharf footage, and so on, and the date of the initial use of the various parcels.

Q. Now, the area which would be marked on the government's exhibit as A appears on the map with a lot of numbers. Will you explain what those numbers are?

A. Well, if I understand what you mean, you are referring to the soundings.

Q. All these numbers on here (indicating).

A. The numbers that are shown in parcel A here are the soundings, that is, the depth of water at mean low low tide, or, as we normally refer to it, as the depth of water below the datum point, and these soundings were taken prior to the dredging that was performed by the Tavares Construction Company.

I would say the soundings were, oh, probably started in December of 1941 and completed sometime in the early spring of 1942, or prior to the dredging that was accomplished by Tavares Construction Company for the shipyard use.

Q. Now, let me ask in that connection: you have used [144] the term "mean low low tide," which perhaps the jury understands, but I don't. Will you explain that, please?

A. Well, that is the average of the low tides. Every day or twice a day you have a low tide, and the average of that low tide is known as the mean low low tide, and

(Testimony of T. W. Eisenman)

that point is used by the engineers and the Coast Geodetic Survey for the datum point or the basis for all your elevations to be taken from.

Q. Did you have to do with the making of those soundings?

A. Yes, these soundings were made under my direction.

Q. As the soundings were made, are they correctly depicted in those figures on the map?

A. Yes, they are.

Mr. Landrum: Your Honor please, we are perfectly willing to stipulate the map in evidence. If it depicts conditions in 1941 and early 1942, there is no objection to it, your Honor.

The Court: Mark it as an exhibit.

The Clerk: Exhibit F, your Honor.

The Court: Exhibit F.

(The document referred to was marked as Defendant National City's Exhibit F, and was received in evidence.)

[Defendants' Exhibit F—Map. See original.]

Q. By Mr. Monroe: Those correctly show the various [145] dates of the commencement of the construction of the things that are indicated on the map?

A. Yes, they do.

Mr. Monroe: We will offer it as National City's next exhibit.

Mr. Landrum: It is stipulated in, your Honor.

The Court: So ordered.

The Clerk: That is Exhibit F.

Mr. Monroe: I think perhaps we will wait to show that to the jury until a little later time. There will be

(Testimony of T. W. Eisenman)

other evidence that will refer to this map and make it perhaps a little more clear.

The Court: Very well.

Q. By Mr. Monroe: This map which I hold in my hand is a photostat, is it not? A. Yes.

Q. And that is of a larger map?

A. Yes, it is of a much larger map.

Q. So that when the scale is shown on the map, that scale would not—

A. It would not apply to the map.

Q. It would not apply to the exhibit, as it shows here?

A. That is right.

Q. But would only be proportionate? [146]

A. That is right.

Q. Thank you. Mr. Eisenman, I wonder if you could very briefly give us a little idea as to what the situation was on this property, taking as a date, for example, November 10, 1942? What was the situation as to what the property was then being used for?

A. On November 10, 1942, as I recall, the shipyard proper was approximately 80 per cent complete; that is, the development for the shipyard was approximately 80 per cent complete, and the yard was actively busy in constructing concrete ships for the United States Maritime Commission.

Q. Now, that area was then being occupied by the Concrete Ship Constructors? A. That is correct.

Q. What, generally, was their business?

A. Shipbuilders.

Q. What sort of ships were they building?

A. Concrete ships.

(Testimony of T. W. Eisenman)

Q. Can you give us something of an idea as to how long it took to turn out a ship?

A. Well, the first one took quite a while. The keel was laid on May 30, 1942, and was launched October 13, 1942. Then as we went along the time of construction was greatly reduced, so we built one ship in a week from the date of keel-laying to launching. Generally speaking, I would say that it [147] took around 100 days to build a ship.

Q. Now, calling attention again to the date of November 10, 1942, was there any ship launched close to that date?

A. Well, the first ship was launched the 13th of October. I imagine the second ship was launched very close in there, but I don't recall—

Q. How about November 11th, Armistice Day?

A. I believe that is correct.

Q. Do you have some photographs taken on the occasion of the launching of the ship on November 11, 1942?

A. Yes, I have.

Q. Are those available?

A. Yes, they are over in one of the other offices. I could get them for you, if you want them.

Q. Suppose we proceed with something else, and we can get those so that we can have them immediately after the noon recess.

Well, they tell me they are right across the hall and you could get them in just a minute?

A. Yes, they are in the judge's chambers.

The Court: I think we permitted them to occupy one of these rooms. Can you get them?

The Witness: I can.

(Testimony of T. W. Eisenman)

Q. By Mr. Monroe: Could you also bring that big panorama? Have you got that? [148] A. Yes.

The Court: You gentlemen had better confer on that. I want to know whether you are agreed on it.

Mr. Landrum: Yes, your Honor.

The Court: Tell the bailiff not to bring the diagram in until I tell him to do so, to just bring the photographs.

Mr. John M. Martin: That is all you asked for.

Mr. Monroe: I asked for a large panorama photograph.

The Court: Only for the panorama photograph?

Mr. Monroe: That is correct.

The Court: Will you come up here, gentlemen, please?

(Thereupon the following proceedings were had between court and counsel, outside the hearing of the jury:)

Mr. Landrum: The government will object to the introduction in evidence and to the exhibiting to the jury of a photograph of something the government was doing on the premises in 1942, in that the land which we are to pay them for is bare land, and a photograph showing the launching of a ship, or, in other words, what the government did at that date is not proper here.

The Court: Is there any dispute between you as to the time when the photograph was taken?

Mr. Landrum: No, I will not dispute that, but I do not think it is proper to show what the government was doing on the premises. [149]

The Court: It may be as to parcel A, there may be some features there that are relevant in the court's view of the case. It is true as to the other parcels it would not be quite informative, but that could be covered by an instruction, I believe.

(Testimony of T. W. Eisenman)

Mr. Landrum: Parcel A, your Honor, is the water. You understand that it is the water parcel?

The Court: You mean the submerged land?

Mr. Landrum: Yes.

The Court: You have to have submerged land in order to have a harbor, and the proximity to a harbor determines the value of the adjacent portions of land.

Mr. Monroe: Here are the pictures, your Honor.

Mr. Landrum: We feel that pictures showing what the government has done is entirely improper to show the value of a bare piece of land. That is what National City has.

Mr. Monroe: Those bundles are all the same, your Honor. There are three photographs.

The Court: I think it gives the jury some idea as to what was there on the day of taking. In other words, it is simply a pictorialization of something the witness would testify to. What is the difference?

Mr. Whelan: As I understood yesterday, your Honor, there was no claim being made that the government should pay for the cost of improvements to the land itself. I understood [150] that was Mr. Monroe's point, that he did not assume and he was not going to contend that the government would have to pay for the cost of improving the land, that had already been done.

Mr. Monroe: That is correct.

The Court: I am not speaking as to the value of the property concerning which the date, November 10, 1942, is applicable. I am speaking as to the value of parcel A, which was not taken on November 10, 1942, so far as the evidence at this time is concerned.

(Testimony of T. W. Eisenman)

Mr. Landrum: If your Honor please, I had suggested to counsel that on this exhibit which he has just introduced, which is this map, there is depicted the actual physical disturbance of these different parcels of land. That is an exhibit in this case right now, and I asked counsel to present that orally at this time, in order that we might understand just exactly when this man was in charge and they actually did interfere with the occupancy of that land. I thought that would clear up our question immediately. He did not do that, but that exhibit is in evidence. My thought is only this, your Honor, that what the government did on this land, any improvement that the government itself made upon it, cannot be claimed by the landowners in this law suit.

The Court: That is true.

Mr. Landrum: Yes. Now, they have a picture there [151] showing a beautiful shipyard in operation. That is my objection to it. This shows it with hundreds of thousands of dollars already spent on it by the government.

The Court: It shows the conditions that existed on the terrain on the date in question, does it not?

Mr. Landrum: Yes, it does, your Honor.

The Court: Then you can cross-examine on that.

Mr. Landrum: Well, I will not take up time on it now.

The Court: When it is shown to the jury, you can show as to what you did. But to exclude a pictorialization as to something that would be narrated by the witness,—

Mr. Whelan: Isn't it clear, may it please the court, that there had been a great amount of leveling done, \$100,000 worth of leveling work, and isn't it clear, rather, that it shall be considered as of the date of the valuation

(Testimony of T. W. Eisenman)

as it existed prior to the time that the government put in the improvements.

The Court: No, it is the condition of the area on the date of taking, whatever it is. If it is beneficial, it is beneficial. If it is detrimental, it is detrimental. But it is a proper matter for the jury to consider.

Mr. Whelan: And it would show the \$100,000 worth of leveling. I believe that is the amount.

The Court: It would show anything which the photographs depict, and you can cross-examine on that. [152]

Proceed, gentlemen.

(Thereupon the proceedings were resumed within the hearing of the jury:)

The Court: As to these photographs, Mr. Eisenman, were you present at the time the pictures were taken?

The Witness: I either took them myself, or one of the men took them. I took a great many of the photographs; probably half of them that were taken in the progress of the work.

Q. By Mr. Monroe: I will hand you first one of the photographs that you have produced, and ask you what that is.

A. This is a photograph of the launching of Concrete No. 2, which was the second concrete vessel to be launched in the past war. This picture was taken on November 11, 1942.

Mr. Monroe: We will offer the photograph in evidence as National City's next exhibit.

(Testimony of T. W. Eisenman)

The Court: So ordered.

The Clerk: That will be Exhibit G.

Mr. Landrum: Exhibit G is objected to, if the court please, upon the ground and for the reason that it is incompetent, irrelevant and immaterial, it being the position of the government that it depicts conditions as they existed on November 11th, but in a changed condition, which has been brought about by the government's expenditures upon this [153] property.

The Court: But it is conceded that it does depict and pictorialize the conditions on that date?

Mr. Landrum: Yes, your Honor.

The Court: The objection is overruled.

(The document referred to was marked Defendant National City's Exhibit G, and was received in evidence.)

[Defendants' Exhibit G—Photograph of shipyard or portion thereof. See original.]

The Court: You will bear in mind, ladies and gentlemen, in considering the effect of these pictures. You will interpret the pictures not only by the picture itself, but by the evidence that is elicited showing the various stages of work and the development that took place at the point indicated by the picture and in the surrounding terrain at that time.

Q. By Mr. Monroe: Now, I will hand you another picture—

The Court: Just a moment. (Continuing) —the surrounding terrain and surrounding submerged portions that will be shown by the picture. I think I should further state there is one parcel here, ladies and gentlemen, known

(Testimony of T. W. Eisenman)

and described as parcel A, which I understand it is agreed by all counsel consisted of submerged lands, that is to say, they were submerged and subject to the ebb and flow of tides at that time. Is that not correct, gentlemen? [154]

Mr. Landrum: As I understand it, that is correct.

Mr. Monroe: That is correct.

The Court: The other parcels are not in the same topographical and nautical situation. Proceed.

Q. By Mr. Monroe: I will hand you another photograph which you have produced, and ask you what that is.

A. This is a photograph showing the construction of a dry dock or, more precisely, a wet dock. It happens to be the third wet dock that was built at this yard, and, also, it shows the construction of the gantry runways, and by that I mean the tracks that carry the large gantry cranes. This picture was taken November 17, 1942. It also shows the dredging operation in the so-called area A. You will note it right ahead of the wet dock.

Q. Now, what is the number of that dock?

A. 3.

Q. That is the one which is shown as Dock No. 3 upon the map that has been introduced in evidence?

A. Yes, Dock No. 3.

Mr. Monroe: We will offer that as National City's next exhibit in evidence.

Mr. Landrum: Do you offer that?

Mr. Monroe: Yes.

Mr. Landrum: Exhibit H is objected to, if your Honor please, upon the ground and for the reason that it shows the [155] land in a condition as having been changed by the operations of the government. It is conceded that it

(Testimony of T. W. Eisenman)

depicts conditions as of this date, but that the land has been changed.

The Court: Is there any question but that is what it does show, Mr. Monroe?

Mr. Monroe: That is correct. It shows what the conditions were on the date of the taking of the picture.

The Court: And some of those conditions were the result of government work?

Mr. Landrum: That is our position.

Mr. Monroe: Well, that, of course, I am unable to say, what was done with the concrete shipyard by the Tavares Company, and what may have happened from there. That I don't know. That I am not familiar with. I am showing this as the condition, and particularly as addressed to the utility of the property.

The Court: The same order will be made, ladies and gentlemen. What I want to impress on you is this, not to take the picture just on its face value, but to use the picture in connection with the other testimony that will be received in the case as to what occurred at certain times.

The Clerk: Exhibit H in evidence.

(The document referred to was marked Defendant National City's Exhibit H, and was received in evidence.) [156]

[Defendants' Exhibit H—Photograph of shipyard or portion thereof. See original.]

(Testimony of T. W. Eisenman)

Q. By Mr. Monroe: Now, what was the date of this next picture?

A. This picture is November 20, 1942.

Q. It shows what?

A. It is a picture looking north from the sand mold, showing the landing dock that was built, I understand, by the San Francisco Bridge Company. This dock is in the immediate background, and in the background you can see the construction of the shipyards proper.

Q. Now, that dock would be on what parcel, if you recall?

A. It is on parcel 7.

Q. That is the parcel marked in blue on the government's exhibit here?

A. That is correct.

Q. And that correctly shows it, as it existed at the time of the taking of the picture?

A. It does.

Mr. Monroe: We will offer the picture as our next numbered exhibit.

The Clerk: Exhibit I.

Mr. Landrum: Exhibit I is objected to upon the ground and for the reason that it depicts conditions having been brought about by the action of the government.

The Court: The objection will be overruled under the [157] same conditions as heretofore stated, ladies and gentlemen, with respect to these other photographs.

(The document referred to was marked Defendant National City's Exhibit I, and was received in evidence.)

[Defendants' Exhibit I—Photograph of shipyard or portion thereof. See original.]

Mr. Monroe: I thought perhaps this might be a good time to show this map and the pictures to the jury.

The Court: Very well. Have you identified all of them that you want to offer now?

Mr. Monroe: Yes. They are all in evidence and marked.

The Court: So ordered. You may pass them around.

Q. By Mr. Monroe: Might I inquire, Mr. Eisenman, as to whether there was any material change between the 10th of November and the dates given on these photographs?

A. Well, we were doing a lot of work. I would say there was quite a little change in the landscape.

(Thereupon the map and photographs referred to were handed to the jury.)

The Court: Apparently the jury has finished its inspection of these exhibits.

We will take our recess now, ladies and gentlemen, until 2:00 o'clock this afternoon. Remember the admonition and keep its terms inviolate. 2:00 o'clock.

(Whereupon, at 12:00 o'clock noon, a recess was taken until 2:00 o'clock p. m. of the same day.) [158]

San Diego, California, Tuesday, February 18, 1947.

2:00 p. m.

The Court: All present. Proceed, gentlemen.

T. W. EISENMAN

the witness on the stand at the time of recess, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination (Resumed)

By Mr. Monroe:

Q. Were you able to procure that large picture that we spoke of?

A. It is there in the other room. I believe the bailiff said he would get it if we needed it.

Mr. Monroe: Could we have that large photograph?

Q. Do you recollect the date of the taking of the photograph? A. Yes; September 13, 1942.

Q. It was taken by you? A. Yes.

Q. And it correctly depicts the condition of the entire area as it then was? A. Yes; it does.

Q. Is the photograph which the bailiff produces the one you had reference to? A. It is. [159]

Mr. Monroe: We will offer it in evidence, your Honor.

Mr. Landrum: Could I ask the designation of the exhibit, what it would be?

The Clerk: It would be defendant National City's Exhibit J.

Mr. Landrum: Defendant National City's Exhibit J is objected to upon the ground and for the reason that it visualizes matters other than the land. It visualizes improvements having been made upon the land by the government.

(Testimony of T. W. Eisenman)

The Court: Manifestly, it does, of course. The evidence will show when those improvements were installed if the case is properly presented. Overruled.

[Defendants' Exhibit J—Photograph of shipyard or portion thereof. See original.]

What is the scope of the panoramic picture?

The Witness: Do you mean in degrees?

The Court: No; just the area.

The Witness: It covers from the approximate location of where the pier was built on the bulk head line, Dike 1, Dike 2, and over to about the south line of Parcel 1. The telephone pole you see on the right side is built along the south line of Parcel 1.

The Court: Does it show Parcel A at all or any portion of it?

The Witness: No. Parcel A is all bayward from there. It also shows land to the north of Parcel 1 that was originally—or we started to develop it originally but it was [160] never completed.

The Court: Then, the panoramic photograph depicts property other than the property that is involved in this action?

The Witness: Yes. On the left side, probably the top three inches of the photograph, the property is probably off of the site; I would say for the first two feet on the left side of the photograph; and then all the rest of it is of Parcel 1.

The Court: Proceed.

(Testimony of T. W. Eisenman)

Q. By Mr. Monroe: Mr. Eisenman, I wonder if you could give us briefly a description of the subject area with reference to how the land lies, what sort of land it is, whether it is smooth, hilly, or whatnot?

A. At what time?

Q. In 1942, in November.

A. Well, in 1942, the land along the bulk head line, that is, where the land meets the water, was approximately at an elevation of 11, that is, 11 feet, above the mean lower tide, and sloped toward the city down to an elevation of plus 8 and, generally speaking, it was quite even in contour. There were no humps or hills but it generally sloped from the ocean toward the land at about a three-foot difference in elevation across the whole site. [161]

Q. Now, approximately how much of the area was occupied by the Concrete Company's shipyards?

A. In November, 1942?

Q. Yes.

A. Well, it was in a fluid state at that time, but, generally speaking, at that date I believe I am safe in saying there had been some work started on all of the land in question; that is, we had started to improve all of it. However, it was not complete, so just exactly where the development was at that time is hard to say without reference. But I could tell exactly where the development was, if you care to have that information.

Q. I was just trying to get it approximately. Now, let me ask, you have stated that in November of 1942 the shipyard was approximately 80 per cent constructed?

A. That is correct.

(Testimony of T. W. Eisenman)

Q. During what period of time, or how long was it before that construction was completed?

A. I believe about May, 1943 we considered the yard substantially complete. Of course, from time to time there were improvements put upon the land that were not contemplated in the original development.

Q. But it was, for practical purposes, a completed shipyard in 1943?

A. That is right; about May, of 1943. [162]

Q. Although it had been in actual operation and producing ships?

A. That is correct.

Mr. Monroe: Might I have that exhibit, that map?

(The document referred to was handed to counsel.)

Q. By Mr. Monroe: In connection with the exhibit numbered Exhibit F, have you in preparing this map taken into consideration the various portions of the various parcels that were submerged and that were above the water?

A. Yes. The areas of the parcels as a whole is stated hereon, and also the areas of the portion of the parcels that were periodically submerged due to tides.

Q. Where do you find those?

A. They are, for instance, parcel 1,—would you like for me to read those?

Q. Suppose we get those figures.

A. On parcel 1 the entire area, as stated hereon, is 800,034 square feet, more or less, and the portion of that area that is submerged periodically due to tides is 49,000 square feet, more or less.

As to parcel 2, the total area is 191,468 square feet, more or less, and it is all above the tide.

(Testimony of T. W. Eisenman)

Parcel No. 3, 1,482,090 square feet, more or less, and of that amount approximately 408,000 square feet is periodically submerged. [163]

Parcel No. 4—

Q. We do not take No. 4 in this matter.

A. Parcel No. 5, 45,039 square feet, and all of that is above the influence of tides.

Parcel 6, 53,739 square feet, more or less, and all of that area is above the influence of the tide.

Parcel 7, 272,626 square feet, more or less, and approximately 44,000 square feet is periodically submerged due to tides.

Parcel No. 8, 11,199 square feet, and approximately 1,000 square feet is periodically submerged due to tides.

Q. And area A is what?

A. Area A is 1,346,756 square feet, more or less, and is entirely submerged.

Q. Now, as to area A you have shown the situation as of November 10, 1942. I will ask you what change, if any, in the conditions of area A there were as of October 3, 1944.

A. You mean what changes had been made from November 10, 1942 to October, 1944?

Q. Yes, sir.

A. While there was considerable dredging that was performed in the interim, and a portion of a pier was built, the bulkhead was partially constructed along the bulkhead line, the south bulkhead along the mole was constructed, and offhand I would say that was the extent of the improvements. [164]

(Testimony of T. W. Eisenman)

Q. Now, as to the dredging, what dredging had there been?

A. Well, offhand I couldn't state what the quantity of dredging was. I could look that up, but—

Q. Well, just approximately.

A. I would say that two-thirds of the dredging was done after that date, that is, November 10, 1942. That is very approximate.

Q. Now, let us take the whole amount. That would be about how much of an area had been dredged, out to what depth, if you can give that?

A. Well, this is also quite approximate. I would say probably six acres of area had been dredged prior to November 10, 1942. As I recall, there was around 18 acres totally dredged, so that would leave 12 acres dredged after November 10, 1942.

Q. Now, with respect to this company, you occupy what position besides your engineering capacity?

A. I am—my title is assistant to the managing partners of Concrete Shipbuilders.

Q. And what is your position in the Tavares Construction Company?

A. I am vice-president of the Tavares Construction Company.

Q. You were in that company at the time that it first [165] started to occupy this property for the purpose of the shipyard?

A. I was. [166]

Q. By Mr. Monroe: Just generally, what particular characteristics did this property have, that you considered when you located your shipyard there in the first instance?

A. Of Course, No. 1 was situated on the bay and it was in such a location that it could be economically de-

(Testimony of T. W. Eisenman)

veloped into a shipyard. And those are the only features that were involved.

Mr. Monroe: You may inquire.

Cross Examination

By Mr. Landrum:

Q. Mr. Eisenman—is that your name?

A. Yes, sir.

Q. You have been with this project from its inception. A. That is correct.

Q. When did you first go upon the land with which we are here concerned to know it?

A. Oh, I couldn't say exactly but probably in the fore-part of November, 1941.

Q. November, 1941? A. Yes, sir.

Q. Are you able to describe for us this land before there was any work done upon it, in the improvement of it?

A. Do you mean before we did any work?

Q. Yes; whether there were any rocks turned or anything. [167]

A. It was a piece of land that laid very nicely in connection with the bay. It had been filled to an elevation of eight to 11 feet. The great portion of the land was dry.

Q. Will you step down to this map and just explain to the jury everything about each parcel and tell them what it was?

A. This line here is what is known as the U. S. Bulkhead Line. This line here is the pier head line. This is where the water starts, and the land starts in this direction. When the land was originally filled, there was an offset back eight feet toward the land from the U. S.

(Testimony of T. W. Eisenman)

Bulkhead Line, and a dike was built along this line. That dike also extended out in this direction, following the pointer here, and back down in this direction. As this land started out, it was tideland, that is, periodically, due to the action of the tides, it was covered with water. Behind this dike and the land it was filled with sand and that was brought to an elevation along the front here of approximately 11 feet, and it sloped back to meet the land, that is, the land that was here, to an elevation of approximately eight feet. This whole area was generally level, that is, it was uniform—not level but uniform—and there was an absence of any hills or gullies. This area here—

Q. You are pointing to Parcel A, are you, on Exhibit 1? [168]

A. Parcel A. This area varied in water depth. It was entirely covered with water and varied in water depth from, I would say, 10 feet below the datum point to the highest probably of say plus 1 or 2 feet over in this corner here. And, generally speaking, the average elevation of this parcel would be approximately minus 4. You could take a rowboat and go over the entire area.

Q. Who was the man actively or actually in charge of the construction or the changes as they took place in this land? Did you have to do that?

A. Yes; I had to do with that. I was the engineer that had charge of the work.

Q. Now, Mr. Eisenman, I want you to take this exhibit with me, which is Defendant's Exhibit F. Will you take Defendant's Exhibit F, taking the parcels separately, by number, and tell the court and jury when the first

(Testimony of T. W. Eisenman)

change or the first improvement was made upon each of those parcels?

A. On Parcel 1 the first improvement was a building that was constructed on this parcel. As I recall, it was for a warehouse. And that was on the first day of January, 1942.

Q. January 1, 1942, there was a building put on there?

A. That is correct. I might say this, that, prior to that date, there was some exploration work done but not construction. [169]

Q. What do you mean by exploration work?

A. We drove some test piles to determine the bearing value of the soil.

Q. Do you know about when you drove those test piles?

A. I think about the day before Christmas, 1941. On Parcel 2, a mold loft was started on August 17, 1942.

Q. What is a mold loft?

A. A mold loft is, in simple terms, a large drafting table, so to speak, that you lay out ships on. This drafting table is a hundred feet or so long and 50 or 60 feet wide.

Q. Is it attached to the real estate?

A. They pour a concrete slab or walk or floor and upon that is built a wood floor so that the carpenters and engineers can lay out the ship. On Parcel 3 was the starting of Dry Dock No. 3 on September 5th, which appears to be the initial work.

Q. Parcel 4 isn't in the case now.

A. The construction of Dry Dock No. 4 was started, on September 12, 1942, on Parcel 5. As to Parcel 6,

(Testimony of T. W. Eisenman)

we are without a record of the initial occupation of that parcel because it was not used for our purposes before that.

Q. Was any particular use made of Parcel 6 prior to November 10, 1942?

A. Yes, sir; very likely we stored some lumber there or [170] something of that sort. As to Parcel 7, on September 5, 1942, we started clearing that area of the San Francisco Bridge's gear, of pontoons and what have you. As to Parcel 8, we haven't any record of when the initial use was made of it and there was no specific operation had on that parcel.

Q. So that you hadn't done anything on it before November 10th?

A. We may have parked equipment or lumber on it but there was no specific structure constructed there. Are you interested in these other parcels?

Q. You might give us Parcel 9. That is the Johnson parcel.

A. I would have to look that up but I can make a guess on it. I have that in my diary. The initial construction there, I believe, was about May 10, 1942. That is an approximate date. I didn't get that date. I would say May 10th is an approximate date. That can be confirmed by my diary, though. On Parcel A, the dredging was the first work there. That started August 27, 1942.

Q. When you say that the dredging started on Parcel A on August 27, 1942, tell the court and jury what, if

(Testimony of T. W. Eisenman)

anything, you did on Parcel A prior to the time you actually started the dredging.

A. Well, early in 1942 and late in 1941 we made soundings to determine the amount of yardage there was to be [171] dredged, and from these soundings we determined the exact position to do the dredging, where the channels were to be and so on.

Q. When you say that you started dredging on August 27, 1942, on Parcel A, just tell us briefly what you mean when you say you started dredging. What did you put there and what did you do?

A. We came in there with a float dredge, a hydraulic suction dredge, and on that date is the date that actually they lowered their boom and started digging into the soil and taking it away. It is quite likely that two or three days before that pipe was laid and preliminary work was done but the actual dredging started on that date with the removal of the sand. This dredging was done to deepen the harbor so ships could come in.

Q. Now, Mr. Eisenman, I notice on Defendant's Exhibit F, particular up here on Parcel A, some figures, the figures to which I am now pointing, 1.6 and 0.9. What does that mean?

A. That is the elevation of the land with reference to the mean low low water.

Q. That isn't very clear to me. Does that mean that that water was that deep there or that there wasn't any water or what?

A. Mean low low tide water was that deep. [172]

Q. How deep was the water right here?

A. 11 feet and 3/10ths.

(Testimony of T. W. Eisenman)

Q. Do you know the date that those soundings were taken? A. Not exactly, no.

Q. About when was it?

A. I would say in the latter part of 1941 or the first part of 1942.

Q. Just take another point right along over here. How deep was the water there?

A. That point is 5 feet 11 inches below the datum plane. This corner it is three and a half feet above.

Q. In other words, at the date that sounding was taken that was out of water?

A. That was out of water.

Q. What is this plus mark?

A. That is plus 4/10ths, nearly half a foot.

Q. Is there any place out here that is out of water?

A. It is just confined to the area near the bulkhead line. The reason for that is that you had a dike and a fill that ran out in the water a short ways.

Q. Just one further question. How did you take those soundings?

A. First, you establish a reference line along the land. In this case the reference line was the reference [173] line established by the U. S. Army Engineers, which was on this 80-foot offset line. Then you measure off the distances that you desire these soundings to be taken and set an instrument up there, a transit or a

(Testimony of T. W. Eisenman)

direction instrument, and ascertain the angle that you desire to take the soundings on. Then a man goes out in a boat, or several men go in a boat, and you drop a weight down. This weight has a line on it that is marked off in feet. And at the same time you have a tide gage, and another man observes the tide gage so that at all times you know where the tide is in reference to the datum plane, and you take these readings, the depth they are below the water, and record them. And, after you finish them you plot them on a plat for some sort of reference. That is originally plotted on a different scale plat and then transferred to this for this purpose. Now, where they are above the datum point, and substantially above the datum point, you ascertain this reference with the aid of a spirit level or a leveling instrument of some sort. [174]

Q. Well, there is just one further question about this datum point. Is that a datum point that you arbitrarily took is that the level of the sea?

A. That is the datum point established by the United States Coast Geodetic Survey. That is what engineering is based on down here.

Q. That is based on the sea level, however?

A. It is based on the fluctuation of the tide; mean low low water.

Mr. Landrum: That is all. Thank you.

(Witness excused.)

HENRY PHILLIP ANEWALT,

called as a witness by and on behalf of the defendant National City, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: Will you state your name, please?

The Witness: Henry Phillip Anewalt, A-n-e-w-a-l-t.

By Mr. Monroe:

Q. State your name, please, to the jury.

A. My name is Henry Phillip Anewalt.

Q. You live where?

A. I have lived in the city of San Diego for a little over 19 years.

Q. What is your business? [175]

A. Real estate and insurance broker, and agent.

Q. You are duly licensed as a broker in the State of California?

A. Yes, sir. I have been that since 1926.

Q. What, generally, has been your line of business as a broker?

A. Since I went into the real estate business I have been specializing in the sale and the lease and management of industrial properties, primarily, and of commercial properties, more or less secondarily.

Q. Have you had experience in appraising property?

A. Yes, sir. I have appraised for the federal government, the State of California, the City of San Diego, the La Mesa-Lemon Grove Irrigation District, various banks and insurance companies, the Santa Fe Railroad, and a number of others.

Q. Over what period of time have you acted as such appraiser?

A. Oh, for approximately 14 or 15 years, anyway.

(Testimony of Henry Phillip Anewalt)

Q. Now, are you associated in any firm here in San Diego?

A. Yes, I am a member of the firm of Hotchkiss & Anewalt.

Q. What is the name of the Hotchkiss of that firm?

A. L. G. Hotchkiss. [176]

Q. During the last four or five years were you still engaged in the real estate business?

A. For the period from February, 1942 until January of 1946 I was in the United States Navy, but I still retained my interest in my real estate firm, and I was fortunate enough to be on duty in San Diego from the time I went back in the Navy until I was sent overseas in January of 1945; and I kept in close touch with my office, and also with the real estate business as a whole, and values.

Q. During that period did you keep in touch with the transactions handled by your office?

A. Yes, sir.

Q. And the sales and leases made?

A. Not only that, but I saw a number of the boys that were in the business, and I was very much interested periodically in checking up on the trend of values and rentals.

Q. Particularly during that period, did you continue to keep in touch with the valuations of property in and about San Diego County?

A. Yes, sir.

Q. As a result of your experience, Mr. Anewalt, have you become familiar generally with the properties around San Diego and National City, and their values?

A. I have.

Q. Did you make an investigation as to the properties [177] that are in dispute here, and I have particular refer-

(Testimony of Henry Phillip Anewalt)

ence to parcel A, and to parcels 1 to 8, inclusive, except 4, for the purpose of ascertaining their value?

A. I made a very extensive one, yes, sir.

Q. Now, I wish you would state first, in a general way, what examination and search you have made for the purpose of ascertaining that value?

A. Well, I went down on the site to refresh my memory of it, I had not seen it for a number of years, and checked over the physical condition, checked over the charts and the maps that covered the area. I made quite an extensive check through the records I had of tideland leases in the city of San Diego, checking the leases that were on the property, two of them, the only two I could find, of the Tavares Construction Company and the San Francisco Bridge Company.

I checked our own records, and with other real estate brokers handling that industrial type of real estate, as to sales and leases and general trends in the market. I checked down at the Harbor Department to see just what the picture was on the amount of industrial lands of the Harbor Department that might be available for lease, and what the conditions of those lands were; checked over the number of the leases, to refresh my memory as to the terms of the San Diego Tideland leases. I made an investigation into general conditions as to the development of the Bay area; checked with [178] the Assessor's office to check on the trend in their own assessments, and checked the tax rates of National City and San Diego as two more or less competitive areas.

Q. Now, let me interpose at that point. While you were in the Navy this last time, what particular job did

(Testimony of Henry Phillip Anewalt)

you have? I mean with reference to what sort of thing you were handling?

A. Well, during the time I was in San Diego, that was from 1942 until 1945, I was what was known as the Naval Transportation Operations officer and Assistant Port Director.

Q. As a part of the duties of that office, were you generally familiar with the Bay and its surroundings?

A. I had to be very familiar with the Bay and its surroundings, because we handled the loading, the embarkation and disembarkation of troops, and the handling of small craft, and various other things along those lines.

Q. Prior to your going into the real estate business, did you have some connection with the business of shipping and transportation?

A. Yes, sir. I was seven years in the steamship business prior to my coming to San Diego.

Q. Now, to get back again to these areas of land, in endeavoring to determine their market value, I wish you would tell the jury what different factors you took into consideration. [179]

A. Well, I took into consideration the fact that a state of war existed in 1942 and was still in existence in 1944, and so far as could be determined reasonably, there was no time at which it might end. I took into consideration the conditions of the tideland area in San Diego Bay. An investigation of the leases of competing, so-called competing tidelands of San Diego disclosed the fact that their leases, as a whole, start in at around one cent a foot,—

Mr. Landrum: Just a moment. If the court please, I object to any comparison or any statement of the lease

(Testimony of Henry Phillip Anewalt)

rentals in the city of San Diego, as not being comparable to this situation.

The Court: I think he should be permitted to detail without too much an extent his experiences in making his investigation, without going into the exact details.

The Witness: I considered the terms of their leases, and, among other things, the fact that they had a cancellation clause in them, that the lessor, the City of San Diego, had the right to terminate the leases.

Mr. Landrum: Just a moment. I object again, if your Honor please, in that he is discussing leases with the City of San Diego.

The Court: Yes. The leases must be produced if you are going into that. He should confine himself generally to his knowledge of the project in suit and of the conditions that [180] obtained at the time of the taking. If you want to explore leases, you would have to produce them so that we would be able to look at them, and so forth, and so on.

Mr. Monroe: Yes.

The Witness: I considered the availability of industrial lands that were serviceable both by rail and by water. I took into consideration the fact that this land had the facilities of the Santa Fe Railway along its eastern border; that it was serviceable by city streets, sewer, water, power, electricity. I took into consideration the uses to which the land was adapted and could be placed. I took into consideration the limitation particularly on M-1 zone property, and I might say M-1 zone is a heavy industrial zone, and that this property is zoned M-2, at least. I should say M-1 is the light industrial, and that this land—that there is relatively little of this type of zone land available.

(Testimony of Henry Phillip Anewalt)

I took into consideration the depths, according to the charts, of the water adjoining this land; took into consideration the fact that a 30-foot ship channel adjoins part of the land, or, at least, area A, which is land and water, or is all water so far as being submerged. I took into consideration the elevations of the land, the fact that it was solid land.

That about covers it, Mr. Monroe, I think.

Q. Now, Mr. Anewalt, with reference to the uses of [181] the property or the uses to which that property was adapted, what, in your opinion, was it particularly adapted for?

A. It was particularly adapted for shipbuilding, adapted for fish canneries, adapted for any of the uses to which similar lands were being placed in San Diego Harbor.

Q. Such things as lumber yards?

A. Lumber yards, and oil—bulk oil terminals.

Q. Would it be fair to say that it was generally adapted for any business that required shipping facilities fronting on the Bay?

A. To all intents and purposes, it would, yes, sir.

Q. Now, what, in your opinion, was the highest and best use to which the property was adapted?

A. In 1942 and 1944, unquestionably for shipbuilding.

Q. What particular things did you have in mind that would make it peculiarly adaptable for that purpose?

A. Its being immediately adjacent to a deep water channel, the fact of the ability to put in either ways or basins, and it had all the other facilities, particularly rail, which is an important item, and the other facilities necessary, from what I had been able to ascertain. The soil

(Testimony of Henry Phillip Anewalt)

conditions were good for it. Of course, we were in a state of war then, and ships were the most necessary things that we could possibly get at the moment.

Q. Now, in making your investigation, did you consider [182] that this was of the character of tidelands?

A. Yes, I did.

Q. What was the situation with reference to the availability of similar lands?

A. Well, in my checking with the Harbor Department as of 1942, they had available, but spoken for, 1.2 acres in the industrial area; in 1943, none; and in 1944, there were six acres, which also I understand was spoken for.

Q. That would include the industrial area of tidelands of San Diego all along the Bay?

A. In the City of San Diego—no, that would include what is considered as the industrial lands, which would be substantially from Fifth Avenue southeasterly.

Q. Now, in making that investigation, what was the situation with reference to the lands, those tidelands which were occupied? Were they leased or were they in the hands of private owners?

A. All of the lands in the City of San Diego were leased or on permit, one or the other, which is substantially the same.

Q. You mean by that they all retained their original character as tidelands? A. As to title?

Q. Yes. A. Yes. [183]

Q. Now, this particular area is located where with reference to the industrial tidelands of San Diego?

A. Just south.

(Testimony of Henry Phillip Anewalt)

Q. That is the National City line joins on to the—

A. City of San Diego's line, but the destroyer base, so-called, abutted the National City-San Diego line, and then it spread over beyond the line into National City, so this would adjoin the destroyer base, but not the San Diego-National City line.

Q. Then it is correct that there would be no land which would be available for leasing for industrial purposes between the industrial lands of San Diego, on the one hand, and the subject property on the other?

A. Industrial tidelands?

Q. Yes. A. That is correct.

Q. What, generally, did you consider as the physical characteristics of the land, as to how it lay?

A. Well, in 1942, in the early part of 1942, it was uneven, more or less as any filled land is that has not had a Fresno over it, and leveled out. It was not perfectly smooth. As I recall it, either in '41 or '42 there was a Santa Fe wire that stuck out in there. And what part of 1942 do you particularly refer to?

Q. What I am getting at, Mr. Anewalt, is more the [184] natural character of the land itself, before improvements were started.

A. Before the improvements were started?

Q. Yes, before they were started.

A. Well, fairly uneven; a typical filled land, that is, primarily sand and some silt in it.

Q. And outside of such smoothing as it would require, did it lie generally even?

A. So far as I can recall, yes.

Q. I mean for practical purposes.

A. Yes, it was even.

(Testimony of Henry Phillip Anewalt)

Q. Did it so lie that it could, with any great amount of leveling, be suited for the purposes you have mentioned? A. Yes, it could.

Q. Now, taking into consideration—let us start first with area A. Taking into consideration all of the things that you have considered in arriving at your opinion, did you form an opinion of the fair market value of area A as of October 2, 1944? A. I did.

Mr. Landrum: Just a moment. If the court please, that is objected to upon the ground and for the reason that it gives an improper date as the date of valuation. I would like to be heard, if I might, for just a moment upon that.

The Court: We discussed that yesterday quite a little. [185]

Mr. Landrum: Yes, sir.

The Court: I think we will hear the evidence as to both dates. Then at the proper time I will consider such motions as may be properly projected at that time, and instruct the jury as to the rule that is applicable.

Mr. Landrum: Yes, your Honor. The date that I believe counsel called off was October—

The Court: October 2nd.

Mr. Monroe: I think I should have said October 3rd, probably. I will look.

I should have said October 3rd.

The Court: Do you want to amend the question?

Mr. Monroe: Yes.

Mr. Landrum: I have the same objection, your Honor, that it is an erroneous date of valuation.

The Court: Will you read the question now, Miss Reporter?

(Question, as amended, was read.)

(Testimony of Henry Phillip Anewalt)

The Court: The objection is overruled.

Mr. Landrum: May we have an exception, your Honor?

Q. By Mr. Monroe: The question is whether you formed an opinion. A. I did.

Q. Now, Mr. Anewalt, before I ask you exactly that opinion, you have spoken of the fair market value, and will [186] you, for the record, give your definition of what is the fair market value?

A. That amount of money, in terms of dollars, that a willing buyer would pay and a willing seller would sell for, with full knowledge of all of the conditions surrounding the transaction.

Q. And would you add to that,—

A. And a reasonable period of time.

Q. And a reasonable period of time?

A. That's right.

Q. I will ask you, then, to state for us your opinion of the value of area A as of the date given, and considering it in its then condition, but eliminating from consideration any structure that might be placed on it.

Mr. Landrum: That is objected to, if the court please, first, upon the ground and for the reason it is an improper date. Secondly, upon the ground and for the reason that it includes within itself an increment of value brought to it on the expenditure of funds prior to the date given, on this project itself, by the government of the United States.

The Court: Objection overruled.

Mr. Landrum: May we have an exception, your Honor?

The Court: Yes. You may have an exception to each adverse ruling.

(Testimony of Henry Phillip Anewalt)

Mr. Landrum: I beg your Honor's pardon. [187]

The Witness: Could I get that question again?

The Court: Read it, please.

The Witness: Was it to give the opinion?

Mr. Monroe: Perhaps we had better have it read to make sure of the things that I put in it.

(The question was read.)

The Witness: In my opinion, that area A was worth \$269,350.

Q. By Mr. Monroe: Now, in arriving at that opinion and in detailing your investigation, you have not mentioned sales, comparable sales of property?

A. I haven't mentioned them, Mr. Monroe, because there are, to my knowledge, no sales of comparable property. The lands of that nature are held by the municipalities to which they adjoin, under the Tideland Grant Act, and as far as I know, normally can't be severed or haven't been severed.

Q. However, in giving your opinion as to value, you considered its market value as of that date, assuming for the sake of the question that it was then salable?

A. Yes, sir, I did, and with all the benefits that would go with the fee owner or somebody being able to own such a parcel of land, with the facilities and opportunities that that land gives.

Q. Now, what would be the fact, assuming that that property was salable as of that date, as to its value, [188] considering the fact, if I properly assume that fact from your answers, that other property similar in physical characteristics was not salable at all?

A. It could not be sold. It had been salable if it could have been sold.

(Testimony of Henry Phillip Anewalt)

Q. I say, assuming this piece was salable, what would be the effect on its value of the fact that other similar properties could not be so purchased?

A. It increases, it makes it considerably more valuable because it gives, with the benefit of ownership, it gives the right to hypothecate, and a number of other things. That is one of the difficulties of leased land.

Mr. Monroe: Now, if your Honor please, might I inquire, because I want to be sure not to transgress here: do I understand you want as to all of the parcels the valuations as of the two different dates at this time?

The Court: No, only as to parcel A.

Mr. Monroe: As to parcel A, yes.

The Court: As to the numbered parcels, the date has been fixed, I believe.

Mr. Monroe: As of November 10th.

The Court: 1942.

Mr. Monroe: I want to keep within those limits.

Q. By Mr. Monroe: Now, Mr. Anewalt, in the same connection did you form an opinion as to the market value, [189] the reasonable market value of the seven parcels, 1 to 8, inclusive, except 4, as of the date of November 10, 1942? A. Yes, I did.

Q. What, in your opinion, was the reasonable market value of those, or, of that body of land as of that date?

Mr. Landrum: That is objected to, if the court please, upon the ground and for the reason that it includes within itself an increment of improvement done by the very project itself.

The Court: Overruled.

The Witness: \$495,940.

(Testimony of Henry Phillip Anewalt)

Q. By Mr. Monroe: In arriving at that valuation, what assumption do you make as to that property, whether it was salable, for the purpose of the question?

A. The same thing applies to that one as did to the other, that it would be of material value with the ability to hold it in fee.

Q. In arriving at that valuation, you considered that as one contiguous parcel?

A. As under one ownership and one contiguous parcel.

Q. Now, in order to complete that showing, what valuation would you place as of the same date, that is, November 10, 1942, on area A?

Mr. Landrum: That is objected to, if the court please, upon the ground and for the reason that it includes within [190] itself the changed condition of the land between the time it was first touched and up to the date he gives.

The Court: Overruled.

The Witness: Do I understand that you want to know my opinion of the value of area A as of November 10, 1942?

Q. By Mr. Monroe: Yes, as it then was.

A. As it then was, in 1942?

Q. That is correct. A. \$134,676.

Q. Now, let's have the total value, in your opinion, of the entire area, including A, as of 1942, assuming that it was all valued as of that date, November 10, 1942.

A. \$630,615.

Q. In arriving at those estimates of value, have you taken into consideration rental values of property?

A. I have taken into consideration the rents that these values would reflect, and I have taken into consideration how they compare with competitive rentals of similar lands under similar conditions.

(Testimony of Henry Phillip Anewalt)

Q. That is, that value for rental is one of the things that you considered in arriving at your final opinion?

A. It is a consideration, and it is more of a test of value than it is a direct consideration of value.

Q. Now, let me have your total figure, valuing the numbered lots, the seven numbered lots or seven numbered [191] parcels as of November, 1942, and area A, the submerged area, as of 1944? What would be that total value? [192]

Mr. Landrum: That is objected to, if the court please, upon the ground and for the reason it contemplates an impossibility.

The Court: What is the impossibility?

Mr. Landrum: There are two dates. A date in 1942—that portion of the land then would only have been sold off and it couldn't be added to Parcel A two years later.

The Court: The sum of the question is that it is simply a mathematical addition of two items that have already been testified about. I think that is all there is to it.

Mr. Monroe: That is correct, your Honor.

The Court: The jury can make the mathematical computation as well as the witness. I will sustain the objection.

Q. By Mr. Monroe: With reference to the difference that you have noted in the value of Area A between 1942 and a time approximately two years thereafter, what elements went into that difference in the valuation?

A. Elements of useability of the area due to dredging and advantages that they would get for both ingress and egress, for mooring and for other uses that water could be placed to.

(Testimony of Henry Phillip Anewalt)

Q. Were there any other considerations as to value?

A. I don't think of any.

Q. What I am getting at, Mr. Anewalt, is whether, in the period between 1942 and 1944, there was or was not a decided change in market values. [193]

A. I didn't follow the question; I am sorry.

Q. I say, in the period between 1942 and 1944, was there or was there not a decided change in market values?

A. There definitely was an increase, a material increase, in rent values and sales values between the latter part of 1942 and the latter part of 1946.

Q. Would that increase any of the rent and sales values of that property?

A. All of this property; yes, sir.

Mr. Monroe: At an appropriate time, your Honor, I want to make an offer of proof to protect the record on that, whenever you think is the best time to make it.

Q. There is one question I would like to ask. We have discussed, Mr. Anewalt, the date of October 3, 1944. Calling your attention to the date of September 23, 1944, would there be any difference in your valuation, or your answers with reference to it, if we assumed that date?

A. No; I don't think in that period of time there would be any recognizable change.

Mr. Monroe: You may inquire.

Cross Examination

By Mr. Landrum:

Q. Mr. Anewalt, I understand just now, in response to a question which counsel asked you, you gave him your opinion of the fair market value of Parcel A, to which I am now point- [194] ing on Plaintiff's Exhibit 1, did you not?

A. That is correct, sir.

(Testimony of Henry Phillip Anewalt)

Q. You gave him your opinion of the value of that parcel of land alone and singly, did you not?

A. That is right.

Q. And by that did you mean to say that this Parcel A, standing alone, without any upland here, was worth the amount of money you said? A. Yes; I did.

Q. Did you consider it as worth anything unless you had an approach to it from the upland?

A. You have a parcel of water with the other lands that, to all intents and purposes, would be accessible to it.

Q. Parcel A was a parcel of some 30 acres of land, covered with water, wasn't it? A. That is correct.

Q. You gave a value to that parcel of land standing alone, did you not? A. That is correct.

Q. Without any way to get to it?

A. Oh, yes; you could get to it by boat.

Q. Was there any other way you could get to it?

A. Yes; there are a number of ways you could get to it; fly to it or swim to it.

Q. But, in order to get clear what you meant to do was [195] to tell this court and jury that, in your opinion, this parcel of 30 acres of land, covered with water, standing alone, was worth \$269,350, is that right?

A. It would be worth that to the people that obtained it; yes, sir.

Q. But, Mr. Anewalt, there wasn't anybody adjoining it. He asked you for the market value of that alone.

A. The market value if I had that for sale?

Q. Standing alone. A. That is right.

(Testimony of Henry Phillip Anewalt)

Q. You also gave your opinion of the market value of Parcels 1 to 8 inclusive, exclusive of Parcel 4, without any water, didn't you?

A. No; I did not. If you will notice on the chart there, there is water in Parcel 3.

Q. Will you come down and show me Parcel 3?

A. This is Parcel 3 on this light blue, or whatever the color of blue is, this area here that comes out here. Your 30-foot channel is out here and you have water and submerged land here.

Q. All right. What was your opinion of the value of Parcel 1, standing alone, without Parcel A in front of it?

A. I didn't value one as a separate parcel.

Q. Will you do it for us or can you do it?

A. I could if I had the time to figure it out. [196]

Q. But, in order to understand it, isn't it a fact that this is all one contiguous ownership and Parcel A's value is reflected in the back land and the back land value is reflected in Parcel A?

A. One would reflect the other.

Q. And that is the only way it would have any value, isn't it?

It would be all together and used together?

A. Well, it would have a value separately if the other land didn't have it; and, if the other land didn't have it, he could have access to Parcel 3 up there. They are all one ownership, 1, 2, 3, 7 and 8.

Q. Mr. Anewalt, could I ask when you first undertook the labor of making your appraisal, when you first started to do it? A. On this particular appraisal?

Q. Yes.

A. About 10 days ago, I would say, or two weeks ago.

(Testimony of Henry Phillip Anewalt)

Q. At that time were you requested to set a separate valuation on Parcel A as of the time you have given us now?

A. At that time I was asked to appraise it as of 1944. I think it was November—September something or other.

Q. As one parcel, weren't you?

A. That is right.

Q. When did you first break it down and give Parcel A [197] a valuation alone?

A. I don't quite follow you.

Q. When did you first arrive at a conclusion with relation to the value of Parcel A standing alone, as you have given it here today?

A. As I was developing the appraisal or my opinion at least.

Q. Did you start out to give an opinion of Parcel A separate from the balance?

A. Parcel A was of a different date.

Q. Who gave you the date? A. Our attorney.

Q. Do you know of all the sales of land in the city of National City within the last few years? Have you made a check of them?

A. I haven't made a check of all the sales; no, sir. We have had some sales that were handled in our business in through there but I wouldn't have made an attempt to give all of the sales in National City. If I had, it would only be industrial property that was serviceable by the railroad.

Q. In the city of National City, not San Diego, do you know of a single sale of industrial property, in the

(Testimony of Henry Phillip Anewalt)

city of National City, within any reasonable length of time, in 1942, for even \$2,000 an acre?

A. Yes. [198]

Q. In the city of National City?

A. Yes; in the city of National City.

Q. All right; give it to me.

A. There was one that was made by our office.

Q. Of land that you considered comparable to this?

A. Well, it was adjoining the Santa Fe and opposite the station out there in National City. We sold it for \$33,000, and it is about a block and a half square.

Q. How many acres?

A. That would be less than two acres.

Q. Now, tell me when you sold it and who you sold it to.

A. That is what I am trying to find here. That was sold in March, 1944.

Q. March, 1944? A. March, 1944.

Q. So a buyer purchasing this property in 1942, on the 10th day of November—you couldn't have taken that sale into consideration, could you?

A. Not for the 1942 valuations; no, sir.

Q. You have got a valuation of a sale here in 1944?

A. That is right.

Q. Do you have any in 1942?

A. No; not in National City.

Q. Mr. Anewalt, you have approached this problem from [199] what we call the economic or profit standpoint, haven't you?

A. No; I have approached it as an industrial real estate problem. When we sell lands in the bay area here, we are not confined to an industrial section, when you

(Testimony of Henry Phillip Anewalt)

sell industrial lands, you sell where it is the most practicable place, whether in Chula Vista or San Diego or where. Industry doesn't go just on the basis of a community.

Q. Do I understand you to say, then, that, in so far as your opinion goes, this land is comparable right here in San Diego, right down in the industrial water front property?

A. In my opinion and from my experience in making tideland leases and selling industrial real estate for 19 years down here, that is true. It is comparable.

Q. It is your opinion that it is comparable to the land right here in San Diego? A. Yes, sir.

Q. Now, I ask you if you didn't approach it from the standpoint of profit or how much money was being paid under those leases. You stated that, didn't you?

A. I stated that, in my opinion, if I had that real estate for sale at those dates, I could have sold it for that. Now, I test that sales value by checking back against what it would return or for rental value. But I didn't use the rental value to make the sales value.

Q. You used it as a check? [200]

A. That is right.

Q. On your other value? A. That is right.

Q. As a matter of fact, you used the sales approach and the profit approach and then reconstruction value, less depreciation?

A. We have to take all three of them and make up our own judgment as to what we can do with it.

Q. I believe you did say that you used some leases as a check.

A. The terms and the rentals; yes.

(Testimony of Henry Phillip Anewalt)

Q. And, of course, what the property produces—that economic approach is a good method to check on the others, isn't it?

A. It is one form of checking; yes, sir.

Q. Tell us how much rental or how much the city of National City had been receiving as rent from anybody on this property, before the war.

A. Before the war, there was the San Francisco Bridge Company lease. I believe there was also a lease before the war with the Allied Engineering Company.

Q. Do you know how much rent the San Francisco Bridge Company was paying?

A. It is very difficult to translate it into dollars. It was paying a nominal amount of rent in a specified sum [201] and they agreed also to do dredging and improve.

Q. What is that specified sum?

A. I have got it here somewhere.

Q. Maybe I can cut this short. Just tell us all of the income that the city of National City received, from all of this property, in the year 1941, if you can.

A. I couldn't tell you all of it because I would have to figure it out.

Q. All you know.

A. It would be a cent a square foot on the original lease with the Allied Engineering Company.

Q. How many feet were in that? Who is the Allied Engineering?

A. That is the predecessor, I believe, to the Concrete Ships, the Tavares interests.

Q. They had a lease which they assigned to Tavares, is that correct?

A. I believe so.

(Testimony of Henry Phillip Anewalt)

Q. On how many acres?

A. I have forgotten the exact number of acres but I think I could check it through. I have got it in my files.

Q. If I told you six acres, would that refresh your recollection? A. I think it was around that.

Q. Six acres out of Parcel 1, is that right? [202]

A. I think it was a little more than six acres. It was not a large amount of acreage.

Q. How many square feet would there be if you are going to figure square feet, right quickly?

A. In 18 acres?

Q. In six acres.

A. It would be between 250 and 260,000 square feet.

Q. Can you give us your rough judgment as to what they received on this hundred acres of land in 1941?

A. The hundred acres was leased.

Q. I know it but I want to know all of the money they took in, in 1941, on this land.

A. That I don't know.

Q. Don't you think that a reasonably prudent buyer, in an investigation of this property on the 10th day of November, 1942, would inquire and want to know as to the income which had been derived from it prior to that time?

A. He certainly would but that wouldn't have any particular bearing on his judgment of it because of the fact in 1942 was the time—

Q. Will you give me your definition of fair market value?

A. Yes; that amount of money in dollars that a willing buyer, knowing all of the circumstances surrounding it, would be willing to pay, and a willing seller would be willing to [203] sell for, in a reasonable period of time.

(Testimony of Henry Phillip Anewalt)

Q. Do you understand that to include war or boom prices?

A. It includes any of the circumstances that surround the time. As far as boom prices are concerned, I wouldn't consider at that time that they had gotten into boom prices.

Q. How much per acre, if you can give it to me right quickly, was this Parcel A worth on November 10, 1942?

A. November 10, 1942?

Q. Yes; correct.

A. I have figured that at 10 cents a foot, which would be \$4,356 per acre.

Q. \$4356 per acre? A. That is right.

Q. That is Parcel A? A. Parcel A.

Q. You had a figure, in 1944, of \$269,000.

A. That was just twice that basic value. Rents and prices had increased and the water area had been dredged.

Q. In the figure which you have given us as of 1944, I believe October 3rd, and in the figure which you have given us as of the other date in 1942, which I believe was November 10th, did you include within that figure any increment or element of value which had been added to that land by virtue of the construction of the shipyard and the dredging of that property? [204]

A. Not in the 1942 value; no, sir.

Q. I want to get that straight. In your 1942 value, you did not include anything for any improvement of that property in the construction of this shipyard?

A. No; I didn't take into consideration any bulk-heading that had been put in or the removal of the "Y" or any of those things.

Q. I want to ask this further question, please. I believe that the testimony in this lawsuit is to the effect

(Testimony of Henry Phillip Anewalt)

that, on the 27th day of August, 1942, extensive dredging began on Parcel A. You didn't include anything for any of that in your 1942 valuation?

A. I am a little bit mixed up with you on the question, Mr. Landrum, if you will pardon me, whether you are talking now of Parcel A by itself or its effect on these other lands.

Q. No. I am trying to clear up that one point. I understood Mr. Eisenman's testimony to be that they started extensive dredging on Parcel A on the 27th day of August, 1942. Now, you have given us a value of November 10, 1942. Have you given us a value of the dredging done on there up to that time or have you discounted or forgotten all about that?

A. No; I haven't discounted or forgotten all about that but not for any physical improvements that were put on the land. [205]

Q. Did you value it as being dredged?

A. As being accessible to dredging; yes.

Q. If it was dredged by virtue of that operation which began on August 27, 1942, did you value it in the condition it was put in by that dredging?

A. That is right.

Q. You included that in your figure?

A. Yes, sir.

Mr. Landrum: At this time, if your Honor please, I move that all testimony of this witness with relation to the valuation of Parcel A be stricken on the ground and for the reason it includes in itself an increment of value which was brought about by the project itself.

The Court: Motion denied.

Mr. Landrum: That is all.

(Testimony of Henry Phillip Anewalt)

The Court: We will take our recess now for a few minutes, ladies and gentlemen: Remember the admonition heretofore given you. Please occupy the jury room.

(Short recess.)

The Court: All present. Proceed.

Mr. Landrum: If your Honor please, might I be permitted to recall Mr. Anewalt? There is one further question that I would like to clear up. I overlooked it.

The Court: Very well. [206]

Q. By Mr. Landrum: Possibly you gave it to us, sir, but in connection with your figure which you gave us, particularly with relation to Parcel 7, did you include any value therein for the leasehold interest which, I believe, the San Francisco Bridge Company had on it?

A. The value that I gave would include any leasehold interest of the San Francisco Bridge Company. I appraised it as a fee and not segregating the interests.

Q. Then, that was the entire fee interest and included any leasehold interest of the San Francisco Bridge Company?

A. Yes, sir.

Q. They also had a lease on Parcel A, did they not?

A. A very small portion.

Q. Would the same answer be true in so far as their leasehold on Parcel A is concerned; that you included whatever value that had in your figure?

A. Yes, sir.

Q. Did you include, however, anything for structures? I understood that you didn't.

A. No; I didn't include that—

Q. That is all.

A. —nor the bridge that the Tavares Company were building.

Mr. Landrum: Thank you; that is all. [207]

A. G. HOTCHKISS

called as a witness by and on behalf of the defendant National City, having been first duly sworn, was examined and testified as follows:

The Clerk: Please state your name.

The Witness: Al G. Hotchkiss.

Direct Examination

By Mr. Monroe:

Q. Where do you live, Mr. Hotchkiss?

A. In San Diego.

Q. For how long? A. 36 years.

Q. What is your business?

A. Real estate and appraiser.

Q. How long have you been in the real estate business?

A. 36 years.

Q. Generally speaking, what type of real estate have you handled in these parts?

A. Well, over the years, every kind practically. I have handled in the last several years office and industrial property and subdivision property.

Q. You are a licensed broker? A. Yes sir.

Q. You are of the firm of Hotchkiss & Anewalt?

A. Yes, sir. [208]

Q. How long has that firm been together in San Diego?

A. Since about 1929 or 1928; I have forgotten which.

Q. Have you also done appraising?

A. Yes, sir.

Q. What has been your experience and training as an appraiser?

A. Well, I am one of the California State Inheritance Tax Appraisers and have been since 1930. I am called

(Testimony of A. G. Hotchkiss)

upon in the work to appraise every type of property that is owned by individuals. I am chairman of the Appraisal Committee of the Real Estate Loan Department of the San Diego Trust & Savings Bank and a director of that institution. I am past president of the San Diego Realty Board and the California Real Estate Association and past chairman of the Appraisal Committee of San Diego Realty Board. I have been a member of that committee for many years.

Q. What type of appraising, besides that of inheritance tax appraiser, have you done during that time?

A. I have made appraisals for individuals and corporations and the federal government and for the city of San Diego and the Mesa Irrigation District and the San Diego Water Department and life insurance companies.

Q. And have you made appraisals both for the federal courts and for the state courts?

A. Yes, sir. [209]

Q. Just briefly what—

The Court: Not for the federal courts.

Mr. Monroe: That is correct, your Honor.

The Court: Federal courts do not employ appraisers.

Mr. Monroe: I should say in the federal court.

The Witness: That is what I meant, too, your Honor.

Q. By Mr. Monroe: What, generally, are your duties as Inheritance Tax Appraiser?

A. That is appraising property that a person possesses when he dies, every kind of property.

Q. And have you been continuously in the real estate business during the times you have mentioned?

A. During all of the times.

(Testimony of A. G. Hotchkiss)

Q. And have you been continuously an inheritance tax appraiser since 1930?

A. 1930; yes, sir.

Q. And have you become familiar with the property values in San Diego and its vicinity?

A. Yes, sir.

Q. Do you also do appraising throughout the county?

A. Yes, sir.

Q. And have you continued during all of this time to make studies of values throughout the county for the purpose of appraising?

A. Yes, sir. [210]

Q. Have you made any investigation with reference to the eight parcels that are involved in this proceeding?

A. Yes, sir.

Q. And I mean those parcels numbered 1 to 8 inclusive, except 4.

A. Yes, sir.

Q. And the Parcel Area A.

A. Yes, sir.

Q. And what, generally speaking, is the character of that area? I mean its physical characteristics, disregarding any structures on it.

A. It is filled tidelands, practically all of it, from its eastern boundary out say below the mean high tide line at one time.

Q. And a portion of it filled?

A. Yes, sir.

Q. For the purpose of arriving at a valuation of that property, what investigation did you make?

A. Well, I inspected the property and I checked its condition and I investigated similar properties in San Diego and talked with the Harbor Commissioner at San Diego, or the Harbor Master at San Diego, regarding similar lands in the City of San Diego and up to the

(Testimony of A. G. Hotchkiss)

boundary lines of San Diego. I have checked values in the district and checked our own office and work in that territory. [211]

Q. In arriving at a valuation, what factors did you take into consideration?

A. Well, I classified this property as industrial property. It is in the M-2 zone.

Q. What is that?

A. That is the industrial zone. It adjoins the San Diego and the Santa Fe Railway, and it also fronts on the waters of San Diego Bay. I took into consideration the growth and population of San Diego and took into consideration the fact that this particular type of land was very scarce in San Diego and vicinity and there was very little of it available. In fact, in the years that we are talking about, there was no similar land available in the City of San Diego with the exception of one or two acres and that was spoken for. That is about the extent of it.

Q. Those are the things that you considered?

A. Yes, sir.

Q. Now, did you consider in arriving at that value, in arriving at your appraisal, what the rental value of that property would be?

A. I took that into consideration.

Q. In making your appraisal, did you consider the fact that this was tideland? A. Yes, sir.

Q. And in what respects did you consider that the tide- [212] land varies from other lands?

A. It is only our tidelands in San Diego and around San Diego Bay that are adjacent to the waters of San Diego Bay and to navigation.

(Testimony of A. G. Hotchkiss)

Q. And what is the fact as to whether there are tide-lands or lands of similar character around the Bay that are actually salable on the open market?

A. There is none.

Q. In arriving at the valuation for purposes of appraisal in connection with this proceeding, did you consider, for the purpose of that appraisal, the fair market value as though it were salable?

A. Yes, sir; I did.

Q. Would there be any effect upon the market value of property of this character, assuming it salable for the sake of the question, by reason of the fact that there was no other similar property that could be bought around the Bay? [213]

A. That would make a very great difference in the salability.

Q. How about the market value?

A. And the market value, also.

Q. Now, considering all of the physical characteristics of the land and all of the things that you have mentioned, did you arrive at an opinion of the fair market value of this entire area as of November 10, 1942?

A. Yes, sir.

Q. And what, in your opinion, was the market value of the area as of that date, disregarding, for the sake of the question, the values of any structures upon the property?

Mr. Landrum: That is objected to upon the ground and for the reason that it is improper as to form, giving an improper date, and that it fails to exclude therefrom any increase by virtue of the government expenditures upon the project itself.

(Testimony of A. G. Hotchkiss)

The Court: The objection is overruled.

The Witness: May I ask you, Mr. Monroe, does that include all of the parcels, plus parcel A, in 1942?

Q. By Mr. Monroe: Yes. I am asking first as to the value of the whole area.

A. Yes, I have arrived at a value.

Q. Now, before you give that value, tell us what you consider as the market value of the property? What [214] definition do you use for that value?

A. It is that price, expressed in terms of money, that a property will bring if it is exposed to the open market, with a reasonable time given to effect a sale, and when all of the conditions and uses to which the property could be put are known to the buyer.

Q. And do you consider in that connection a willing buyer and a willing seller, neither of them acting under any compulsion?

A. Yes, sir.

Q. With that definition in mind, what, in your opinion, was the market value of the entire area as of the date mentioned?

A. \$655,474.

Q. Now, let me ask you this: as between that date and October 3, 1944, was there any change in the value of the property, the market value?

A. From 1942 to 1944?

Q. Yes. A. Yes, there was, in my opinion.

Q. If we would fix the value of parcel A as of October 3, 1944, what difference would that make in your appraisal?

A. In the total value?

Mr. Landrum: That is objected to, if the court please, as an improper date. [215]

The Court: The objection is overruled.

The Witness: \$723,052.

(Testimony of A. G. Hotchkiss)

Mr. Crouch: What is that figure?

The Witness: \$723,052.

Q. By Mr. Monroe: That would be your total value, as you fixed the value of parcel A as of that date and of the remaining parcels as of the date in 1942; is that correct? A. Yes, sir.

Q. Mr. Hotchkiss, in arriving at that evaluation, did you consider rental values of the property?

A. I took that into consideration as one of the factors in determining the value.

Q. Was that a determining factor or simply one of the things that you considered?

A. One of the factors that I took into consideration.

Q. What did you consider as a reasonable rental value of that property as in 1942?

A. Which property, Mr. Monroe?

Q. The entire area.

A. Well, on the dry land, I broke it down in giving—in considering a rental value. My values reflect a certain rental. In other words, if I had that property—had I had that property for sale in 1942, as a real estate broker, in my opinion I could obtain the price that I have set on it. [216]

Q. That is the entire price?

A. That is the entire price.

Q. In dollars and cents? A. Yes, sir.

Q. In arriving at that price, what have you considered as to the title which would be passed in that sale?

A. A fee title.

Q. That is with all the attributes of a fee?

A. An unrestricted fee title; a fee title.

(Testimony of A. G. Hotchkiss)

Q. Now, what was the situation as of the time mentioned with reference to the tidelands around San Diego Bay, as to whether they were rented at that time or not?

A. In 1942?

Q. Yes.

A. In 1942 there was only 1½ acres left around the Bay that wasn't leased, in the city of San Diego.

Q. And did you investigate those various leases?

A. Yes, sir.

Q. Did you find that in arriving at the rental charged in dollars and cents that there were other considerations that entered into the leases, in addition to the rent?

A. I might explain that, Mr. Monroe, in this way: in fixing the rental of tideland leases in our city here, a great many other factors are taken into consideration in placing the rent. For instance, if the Harbor Department [217] decide that they want a one-cent rent, a one-cent rent for a piece of property, for a piece of tideland property, it does not apply to you and I and everybody else in the city of San Diego. In other words, there are other conditions and other considerations that they must find out before they will rent that land to you at one cent. They want to know what you are going to put on it. They want to know how much taxes they are going to derive out of what you do. They want to know what kind of a pay roll you are going to have for the City of San Diego. In other words, they want to know what our tidelands will produce for us in dollars and cents other than the rental they fix on it at the time.

Q. Now, with reference to the use of the tidelands, while they are rented, what difference, if any, is there from the standpoint of the occupant of that land in con-

(Testimony of A. G. Hotchkiss)

ducting his busienss? What factors enter into that picture?

A. Will you pardon me? Will you read the question to me?

(The question was read.)

A. I don't understand the question.

Q. I think I phrased it awkwardly. What I am trying to get at is: what difference does it make from the standpoint of organizing and conducting a business upon a piece of tideland whether the owner could buy it and receive a fee, or whether he was restricted to merely renting it from the [218] City?

A. He is restricted to renting it from the City. He can't buy it.

Q. In that case, what effect does that have on his business, and why is one more desirable than the other, if that is the fact?

A. There is this big detriment in having a lease on the tidelands of San Diego, rather than a fee title. A great many businesses, the larger businesses, must be financed, and it is impossible to get a mortgage. Our institution, for instance, would not make a loan to an individual on the real estate holdings on his improvements if they were set upon leased ground for the very obvious reason that if anything happened to it, we could not get title to the land to liquidate our debt. That is very important on the two, a title to a leasehold or a title in fee simple.

Q. Now, in making your investigation did you form an opinion as to what was the highest and best use of this property?

A. Yes, sir.

(Testimony of A. G. Hotchkiss)

Q. What did you conclude in that regard?

A. Industrial property, particularly ship building and ship repairs.

Q. How about any other sort of industrial property?

A. It could be used, this particular property could be [219] used very readily in the lumber business as a terminal for unloading lumber. They used to bring lumber to San Diego on log rafts and the government has stopped that because of the danger to navigation in the rafts breaking up, and they come in now in boats. They could be unloaded there. It could be used as an oil terminal, or any business that desires and must have water and rail transportation. The rails are adjacent on the one side and water transportation on the other.

Q. What would you consider is particularly the highest and best use of the property?

A. Of this particular parcel?

Q. Yes. A. Shipbuilding and ship repair.

Q. What factors do you consider in arriving at that opinion?

A. Well, the fact that there is a demand in San Diego for that class of business, and that particular piece of property is very readily adaptable to it.

Q. Are you speaking now of its physical characteristics? A. Its physical characteristics.

Q. And you conclude from your investigation that it was peculiarly adaptable for that type of business?

A. Yes, sir, it is.

Q. What did you conclude was the reasonable rental [220] value of the property? I mean, what in dollars and cents would it reasonably produce in 1942?

A. About 1.2 per cent, which reflects about one cent a square foot.

(Testimony of A. G. Hotchkiss)

Q. Taking your market value, your overall market value for 1942, what does that work out in dollars per acre?

A. In 1942?

Q. Yes, approximately.

A. It works out to about \$436.50 an acre.

Mr. Landrum: I didn't hear that.

The Witness: About \$436.50 an acre.

Mr. Landrum: \$436.50 an acre?

A. Yes.

Q. By Mr. Monroe: I am speaking not of the rental value, but I am speaking of the market value of the fee.

A. The market value of the land?

Q. In dollars per acre, if you have that figure.

A. Yes. On my total value of \$723,000, that is, valuing the parcels in 1942 and area A in 1944, its figures \$7,493 an acre.

Q. Would you consider that there is any difference in value between September 23, 1944 and October 3, 1944?

Q. Between what dates?

Q. September 23, 1944 and October 3rd.

A. Well, it would be so small it would be practically [221] impossible to determine it.

Q. Where does this land lie with reference to the industrial tidelands of San Diego?

A. Well, just southeast of them, over the line in National City.

Q. And the destroyer base is between them?

A. The destroyer base is between them. In fact, the destroyer base comes right near the two particular lines.

Q. So that this would be the first available industrial site past the industrial sites of San Diego?

A. Yes, sir.

(Testimony of A. G. Hotchkiss)

Q. And the two cities run together?

A. Yes, sir.

Mr. Monroe: You may inquire.

Cross Examination

By Mr. Landman:

Q. Mr. Hotchkiss, you have been discussing the question of the availability of tidelands in the City of San Diego, have you not?

A. Yes, sir.

Q. Which direction is San Diego from the land with which we are here concerned?

A. North and west.

Q. What about the tidelands south, on the other side? Are there any available down there? [222]

A. Yes, but not adjacent to deep water.

Q. Now, in 1942 isn't it a fact that the City of National City had available 30 acres of land adjacent to this on the south, in 1942?

A. Yes, I think they did

Q. Why do you not consider that, in addition to your consideration of the fact that there wasn't any in San Diego?

A. Well, that is just beyond the deep water. In other words, it would be quite a little bit more expensive to go on to that.

Q. As a matter of fact, there was available a tract of 30 acres in 1942 that laid right up against this?

A. But it was impossible to do anything with it.

Q. As a matter of fact, it is impossible to do anything with most of this land without you spend some money on it?

A. That is not the reason I had in mind.

(Testimony of A. G. Hotchkiss)

Q. All right. Now, where is Chula Vista?

A. South of that.

Q. Was there anything available down there in the nature of tidelands?

A. Yes, but quite a distance away from the channel.

Q. The channel which you are referring to, is that a shallower channel?

A. No, that is a channel that has about 30 feet of water [223] in it.

Q. Well, as a matter of fact, there were tidelands available all the way down if you just stepped over the south line of this property?

A. But you couldn't use it.

Q. All right.

A. I mean you couldn't get it at the time on account of the fact that the Navy had told practically every real estate man in town they were going to take it, so it was impossible to do anything with it. I mean, in our office we did not attempt to.

Q. They had not taken it in 1942, had they?

A. They hadn't taken it, but the threat was there in 1942.

Q. As a matter of fact, the valuation you placed on this property could only be placed upon it because the government of the United States could take it in condemnation; isn't that true?

A. I placed a valuation on it as being able to be sold and owned in fee simple.

Q. Mr. Hotchkiss, you have stated to this court and jury that on account of the fact that you couldn't get a

(Testimony of A. G. Hotchkiss)

fee title to this land, that nobody could do it, that it had a greater value?

A. It did have a greater value. [224]

Q. And the only one that can do it and the only way it could be done was through the government of the United States taking it, as they are doing it here?

A. I think that is—

Mr. Monroe: Just a moment. That we will object to as argumentative and not proper cross examination, your Honor.

The Court: If the witness has examined that phase of it, he may answer.

Mr. Landrum: Mr. Hotchkiss—

The Court: Do you want him to answer?

Mr. Landrum: Yes. I thought he had.

Q. By Mr. Landrum: That is a fact, isn't it, Mr. Hotchkiss?

A. It is a fact that that is about the only agency that can take it away from the City of National City.

Q. Yes, that is right?

The Court: Wait until he finishes, counsel.

The Witness: That is right.

Q. By Mr. Landrum: That is the only agency that can take it away from National City?

A. That is my opinion.

Q. Mr. Hotchkiss, what do you consider a proper definition of fair market value?

A. I stated it a moment ago. Do you want me to state it again? [225]

Q. Yes.

A. It is that price, expressed in money, that a property would bring if exposed to the open market, with a

(Testimony of A. G. Hotchkiss)

reasonable time given to effect a sale, and all the facts about the property known.

Q. Does the element of taking it away from anybody enter into it? A. No.

Q. As a matter of fact, it includes a willing buyer and a willing seller?

A. Correct. That is another definition of it. It is that price that a willing buyer will pay who does not have to buy, and a willing seller will take who does not have to sell.

Q. You have to have a willing buyer and a willing seller?

A. That is correct.

Q. All right. Now, are you familiar with the statutes of the State of California with relation to the leases which might be made upon this property by the City of National City? A. Yes, sir.

Q. How long a lease could the City of National City have entered into for these properties on the 10th day of November, 1942, they being unimproved at that time?

A. I think a lease for 25 years, periods of 25 years.
[226]

Q. Mr. Hotchkiss, do you consider that to be the law of the State of California?

A. There is a limitation on the time you can lease it, and I am not just positive what that is right now. I did know, but I have forgotten it.

Q. Mr. Hotchkiss, you have discussed with the court and jury the question of how much better it is to have a fee title rather than to lease it, have you not?

A. Yes, sir.

(Testimony of A. G. Hotchkiss)

Q. How long could you lease it for?

A. Well, I can't tell you just the time. I think it is 25 years, with an option of 25 years; or 50 years, with an option of 50.

Q. Wouldn't it make a great deal of difference whether it was 25, with an option of 25, or 50 with an option of 50?

A. It might make some difference.

Q. Wouldn't it in your opinion?

A. Yes, sir.

Q. Will you examine the last Act, which I believe was in 1925? Now, if that provides that as to unimproved lands the City of National City could have entered into a lease for 50 years, with a provision for an extension of 50 years,—

A. That's right.

Q. —a man could have gotten a 100-year lease on this property? [227]

A. That's right.

Q. Would it have been necessary for him to buy it, then, if he could have gotten a 100-year lease?

A. It certainly would, because he couldn't hypothecate it to borrow money to run his business. That is the big difference.

Q. When the City of National City owns lands, it is off the tax rolls, isn't it?

A. The land is, yes, sir.

Q. As a matter of fact, that being true, they could lease it at a lesser rental than a private individual could have?

A. They could.

Q. Yes, sir.

A. But the improvements aren't off the tax rolls.

Q. Now, I believe you are a partner of Mr. Anewalt's, who just preceded you?

A. Yes.

(Testimony of A. G. Hotchkiss)

Q. Mr. Anewalt discussed with us a sale he said had been made. Are you familiar with the legal description of that property?

A. I can't give it offhand. I could get it for you, if you want it.

Mr. Landrum: Could he do that, your Honor please?

The Court: Is it in the court room? [228]

The Witness: I think Mr. Anewalt has it.

Mr. Landrum: I would like to have that description, your Honor.

The Court: Yes.

Q. By Mr. Landrum: Mr. Hotchkiss, will you give me the legal description of the premises which Mr. Anewalt said had been sold, and he knew of the sale?

A. Lots 1 to 18, inclusive, in block 280.

Q. Lots 1 to 18, inclusive, in block 280 of the City of National City.

A. Pardon me. Lots 1 to 10, inclusive, and lots 18 to 21, inclusive.

Q. Lots 1 to 10, inclusive, and lots 18 to 21, inclusive; that is a correct description?

A. In block 280 and block 281.

Q. And block 281? A. Yes, sir.

Q. All right. Thank you, sir. Now, with relation to this one-cent-a-square-foot rental, you said something to the effect that you broke it down, or something,—when you said that one cent a square foot was a fair rental?

A. I said one cent a square foot is a fair rental to start out with.

Q. I beg your pardon?

A. I say, to start out with that is a fair rental. [229]

(Testimony of A. G. Hotchkiss)

Q. What do you mean, to start with?

A. When the lease is made. I think all of those leases should be graduated.

Q. You mean it should be increased or decreased as the times get good or bad? A. Graduated up.

Q. Graduated up? A. Yes, sir.

Q. You wouldn't consider it might be graduated down if times got bad?

A. That has never happened here.

Q. Were you here after the other war?

A. Yes, sir.

Q. Now, do you say that one cent a square foot is a proper rental value to be reflected regardless of the depth of the land?

A. On that particular piece of land, I should say yes.

Q. To put it in plain language of the street, you think that land is worth as much as shore land?

A. Exactly as much in that particular tract, because it is all under one ownership.

Q. Well, how far back would that go?

A. May I explain that?

Q. Yes, sir.

A. If you had a business on that particular track of [230] land, and you wanted water frontage and you wanted rail frontage, and you had a boat, and you had an office, and you wanted to put that back on the back end of it, it is as important as the dock on the front or your electrical equipment might be, so I make no distinction in the value of that rental on any spot of that land from the front to the back.

Q. Now, I don't know much about the measurements. Can you tell me how far back you are going to go back

(Testimony of A. G. Hotchkiss)

here and say that land there is worth as much as that here (indicating)?

A. Yes, sir, I say that under one ownership it is worth just the same.

Q. How far back have you gone? How many feet?

A. Approximately 1400 or 1500.

Q. Mr. Hotchkiss, I believe you said you had been in the real estate business here for some 30 years?

A. Yes, sir.

Q. Do you know Mr. Ewart Goodwin?

A. Yes, sir.

Q. I will ask you to state whether or not early in the summer of 1943 you did not discuss this same problem with Mr. Goodwin.

A. Yes, sir.

Q. I will ask you if it isn't a fact,—

A. He called me and asked me what I thought the rental [231] value of that land might be.

Q. And I will ask you if it isn't a fact that at that time you agreed with him that that one cent a foot should not be reflected back more than 200 or 300 feet?

A. I did not.

Q. You did not. All right, sir.

A. I discussed that with him again, and told him I didn't say that.

Q. What did you say?

A. I said I discussed that with him afterwards, and told him that I didn't say that, or I didn't consider that.

Q. Did you and he actually discuss that phase of it?

A. You said that I did at one time. That was quite a while back.

(Testimony of A. G. Hotchkiss)

Q. I asked you if you did.

A. Mr. Goodwin said I did, and I think I did. Certainly if he said I did, I did.

Q. Now, in the figure which you have given as being your fee simple valuation, your overall valuation of the entire land with which we are concerned here, which was in the ownership of the City of National City, have you included in your figure all leasehold interests, all interests of everyone except the structures upon it?

A. Yes, sir.

Q. How much then did you consider the lease which the [232] Tavares Construction Company had on that property to be worth, separate and out of your fee value?

A. I didn't consider it.

Q. What do you mean, you didn't consider it?

A. I didn't consider it. I considered the land in fee simple without any restriction; an unrestricted value.

Q. You knew, did you not, that the Tavares Construction Company had a lease on it, or more than one lease?

A. Yes, they had a lease.

Q. Did you consider that lease added to or detracted from the value of this property in any way?

A. I didn't think it detracted from the value of it?

Q. Did it add anything to it?

A. I didn't give it any consideration in the value of the land. I put the value on that property as to what I thought I could sell the property for, if I had it to sell to a purchaser that wanted to buy it.

Q. Yes. And that lease was on there at that time?

A. That lease was on it.

(Testimony of A. G. Hotchkiss)

Q. Now, the purchaser would buy it subject to the terms and conditions of that lease, wouldn't he?

A. If it was on there at the time, he would have to, yes.

Q. You know it was on there, don't you?

A. But I tell you I appraised the property in fee [233] simple, without any restrictions.

Q. You have also appraised it for the Tavares Construction Company, haven't you? A. Yes, sir.

Q. You did know, then, they had a lease on here, didn't you?

A. Yes, I knew they had a lease on here, but didn't take it into consideration in arriving at the value I gave.

Q. How long a lease was that?

A. Will you let me get some more papers, sir?

The lease was entered into on January 1, 1942, and it is my understanding it ran for 25 years.

Q. Yes, sir. A 25-year lease? A. Yes, sir.

Q. What were they going to pay for it?

Mr. Monroe: Now, if your Honor please, we will object to that as not proper cross examination.

The Court: Overruled.

The Witness: One cent a square foot.

Q. By Mr. Landrum: One cent a square foot. Then it is true, is it not, that as to that parcel of land its income was fixed for a period of 25 years, wasn't it?

A. Yes, sir.

Q. And it was fixed before 1944, wasn't it?

A. Yes, sir. [234]

Q. It was fixed on January 1, 1942, wasn't it?

A. Yes, sir.

(Testimony of A. G. Hotchkiss)

Q. Now, let me ask you this question: did the Tavares Construction Company have a lease on any portion of parcel A? A. At that time?

Q. Yes, sir, in 1942. A. No, sir.

Q. Did they ever have a lease on it?

A. No, sir.

Q. Who had a lease on it?

A. A portion of it was leased to the San Francisco Bridge Company. They had a lease on it.

Q. What rental did they pay for that land covered by water?

A. Well, that lease commenced on January 1, 1941 and ended December 31, 1950, with an option of renewal for an additional ten years. They paid \$10 a month for the first ten years, and \$50 a month for the last ten years. They agreed also to do certain dredging. There was no time limit mentioned in the lease as to when the dredging might be done. I had no knowledge of whether they ever did it or not, so I gave no value to that.

Q. Now, to get those terms in my mind, I want to ask you: for how long was it \$10 a month? [235]

A. Ten years.

Q. How many acres did that include? How many acres did they get for \$10 a month?

A. They got that parcel there at the elbow.

Q. Would it be this (indicating)?

A. Down below.

Q. The bridge company had a lease on parcel 7, and is it then fair to say that that portion of parcel A which lies to the south where I am running this pencil on Exhibit 1 is what they had a lease on? Is that about right?

A. I am sorry, but I don't have the exact area.

(Testimony of A. G. Hotchkiss)

Q. Counsel has just informed me it was a fraction over 8 acres, and I will assume that to be true. You think that is about right?

A. I think it is right. I don't have the exact acreage.

Q. And you say it is a 25-year lease, or, a 10-year lease?

A. It is a 10-year lease, with an option on another 10 years.

Q. With an option of 10 years further. So the income from parcel A, the 8 acres of it, was fixed for a period of 20 years, was it not?

A. Yes, but not at \$10.

Q. No, we will take it at \$50. [236]

A. And not at \$50.

Q. What was it?

A. Plus certain work that was to be done that National City would eventually get the benefit of, and that is indeterminable. I don't know what that work would cost. There is such a variation in the valuation of dredging, it is practically impossible to place that value on it.

Q. Mr. Hotchkiss, of course, the price at which a piece of land would sell would be influenced somewhat by the amount of income which might be derived from a lease on it; isn't that correct?

A. If that was a property rental, yes.

Q. But you do use it, don't you, as a check?

A. We use it for a check, but may I say one other thing regarding that, the different factors you take into consideration in value. A piece of property at a rental might figure out a certain amount of money. By comparing it with other sales, it might figure out at a certain amount of money, and in reproduction cost it might figure

(Testimony of A. G. Hotchkiss)

out at a certain amount of money, and adding them all together it might figure out at a certain amount of money and still might not sell for anything like it. And the only way you can tell that is to have been in the business and know what property will sell for and what its actual value is.

Q. What I am thinking of is, if a man had a piece of [237] property leased at \$10, and he had a \$10 rental on the property for a period of 20 years, he couldn't sell it for much, could he?

A. I wouldn't say. It would depend upon what the other conditions of the lease were. As I said before, the money consideration isn't the only consideration in making long leases.

Q. Now, let's take a case, then, where the money consideration is the only consideration.

A. Then it has a bearing.

Q. That is right? A. Yes, sir.

Q. And you know you don't up the price any when the income is already fixed?

A. No, if the income is all that is taken into consideration.

Mr. Landrum: That is right. Thank you, sir. That is all.

(Witness excused).

The Court: Call another witness.

Mr. Monroe: Mr. Mueller.

You intend to run to 5:00 o'clock, do you, your Honor?

The Court: I propose to, yes. [238]

EDWIN A. MUELLER,

called as a witness by and on behalf of the defendant National City, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: Will you state your name, please?

The Witness: Edwin A. Mueller, M-u-e-l-l-e-r. By Mr. Monroe:

Q. Where do you live, Mr. Mueller?

A. San Diego.

Q. For how long?

A. I have lived in San Diego since 1913.

Q. And what is your business?

A. I am a State inheritance tax appraiser.

Q. Are you also in the real estate business?

A. No, not at the present time. I devote my time exclusively to appraisal work.

Q. Prior to becoming an inheritance tax appraiser, you were in the real estate business? A. I was.

Q. And a licensed broker? A. I was.

Q. How long have you been an inheritance tax appraiser? A. Since 1931.

Q. You are one of the three inheritance tax appraisers [239] in San Diego County? A. I am.

Q. Have you done other work of appraising?

A. Yes, I have done extensive other work as an appraiser. I have been employed by the California Insurance Department, the California Corporation Department, the California Highway Department, the State Board of Equalization of the State of California, the California Securities Commission, the Attorney General of the State of California, the State Controller. I have been employed

(Testimony of Edwin A. Mueller)

by the Federal Bankruptcy Courts. I was employed by the United States Government to appraise a federal housing project at 47th and Market Streets, for condemnation, although no trial was ever had. I was also employed by the United States Government to appraise what is now Camp Lockett, formerly the Campo Ranch, for the United States Government for condemnation, although no trial was ever necessary.

During the past two years, and within the past year, as a matter of fact, I appraised the entire Warner Ranch, consisting of 46,000 acres, for the California Securities Commission; also, all of the lands embraced in the Vista Irrigation District. During the past two years I made an appraisal of the property of the Mendenhall Cattle Company, comprising approximately 12,000 acres. I have been employed as an appraiser by the San Diego Gas & Electric Company, [240] by the Solar Aircraft Corporation, by the F. T. Scripps Corporation. Some of the industrial appraisals that I made were, for example, the assets, including machinery and real property, of the California Electric Company. In 1942, in collaboration with Mr. George Schmutz, and others, I made an appraisal of the storage yard and the buildings and equipment of the San Diego Gas & Electric Company. I made an appraisal in 1944 of all of the assets of the Standard Furniture Company on Kettner Boulevard, a part of which is commercial property. I made an appraisal in the year 1945 of certain commercial and industrial property belonging to the Ace Van & Storage Company. I made an appraisal in 1944 of the assets, including the leasehold plant, facilities, and machinery, and so forth, of the American Fisheries Company, which is a corporation operating on the San

(Testimony of Edwin A. Mueller)

Diego municipal tidelands. In 1944 I appraised the assets of Hills & Bouchey, a construction company. In 1946 I appraised certain industrial lands located in Chula Vista, at the harbor site industrial district, belonging to Jaekel & Rogers, a partnership. I made an appraisal of the Shell-town Auto Court, which later became a part of the United States destroyer base. I made an appraisal in 1946 of the plant, equipment and machinery of the Serv-All Company, which is a manufacturing and machining company located in Chula Vista. [241]

Q. Now, as a result of this experience have you become familiar generally with the values of real property in and about the County of San Diego? A. I have.

Q. Have you made an investigation as to the property which is the subject-matter of this suit, for the purpose of ascertaining its fair market value?

A. I have. As a matter of fact, I have been more or less directly or indirectly connected with this property for a great many years because, as a member of the California legislature, in 1923 I was the author of the Act or the bill which granted these tidelands to the City of National City; and I was also the author of the bill which amended that Act to extend the leasing period to 50 years in 1925. [242]

At that time I was also the author of the Act which granted the tidelands to the City of Coronado. Also, of an act which enlarged and amplified the grant of the tidelands to the City of San Diego. I was the original author of the Mission Bay State Park bill, which was passed and which was a law.

Q. Now, with reference to this particular tract of land in suit, tell us generally what knowledge you have of

(Testimony of Edwin A. Mueller)

it, and what investigation in a general way you made for the purpose of ascertaining its value.

A. Well, first of all, I took into consideration the primary things about the land, such as its area, its location, the type of soil, the existing improvements, if any, the utilities available, the railroad facilities available, the general uses to which it could be put, the availability of competitive sites, the need for industrial sites. I made an investigation of the City of San Diego tideland leases. In fact, I made a very exhaustive investigation of them from the standpoint of ascertaining whether or not there was any necessity for developing additional tidelands. I made an investigation of the rates charged on tideland leases, not only in National City, such as there were, but also in the City of San Diego, and I also discussed with Mr. Brennan, the Harbor Master of San Diego, the question of whether or not the rental fixed in the leases represented the entire considera-[243] tion. Those are a part of the things which I did and took into consideration.

Q. Did you also make some investigation as to sales of property?

A. Yes, I made an investigation of as many sales as I could find.

Q. Now, in that connection were there any such things as sales of tidelands?

A. No, there are no sales of tidelands. They could not be sold under the law of California.

Q. And any sales of property that had frontage on the water extending out to the bulkhead line?

A. There were no such sales. I want to amend my last statement, however, that no property considered tidelands under the constitution of the State, which is within

(Testimony of Edwin A. Mueller)

two miles of any incorporated area, can be sold, and this property particularly could not be sold. It so stated in the Act.

Q. Now, in arriving at evaluations of that property, what different factors did you consider?

A. I think I have cited a great many of them. I want to add that I made an investigation particularly from the standpoint of the need for additional industrial area, and I made an analysis of the conditions as they existed from 1940 to 1944. I found, for instance, that, according to the Bureau [244] of the Census, and as to 1944 according to the official OPA estimates, San Diego County had a population of 289,000 people—I am dropping the odd hundreds—in 1940, and 505,000 people in 1944. I found that persons gainfully employed—

Mr. Landrum: If your Honor please, I do not like to interrupt, but I am perfectly willing to admit this witness's qualifications. I do not want to interrupt, but it seems that we are going rather far afield with relation to the investigation of this situation.

The Court: I think we ought to curtail it, in view of the concession of the government that the witness is qualified.

Mr. Monroe: Well, I am trying to get at the various factors which he considered in valuing it, not so much from the standpoint of his qualifications. I think he has given that, but from the standpoint of those factors which he considered in arriving at the value—

The Court: He might epitomize it as much as he can, in justice to himself.

Q. By Mr. Monroe: Then let me ask you another question: Mr. Mueller, starting with the question of the

(Testimony of Edwin A. Mueller)

nature and character of the property, and its soil, and the way it lies, as you have mentioned, what did you find in that connection? [245]

A. Well, I found—to save time, I found the same situation as the witnesses ahead of me have testified to, that certain areas had an elevation of eight to 12 feet, whereas Area A, which is the overflowed land in 1942 had had some dredging done, and in 1944 had approximately 18 acres fully dredged.

Q. Did you arrive at a conclusion as to what the land was best fitted for? A. I did.

Q. What do you consider as its highest and best use?

A. I wouldn't put any single use on that land. I think its highest and best use is for industrial developments similar to the water front of the City of San Diego, for canneries—they are bunched side by side, some of them with frontages of only 150 feet, but there are canneries, there are lumber processing companies, lumber yards, there are boat repair works and shipbuilding works. I can go through the whole list here and cite a dozen uses.

Q. Well, without perhaps going into that, Mr. Mueller, would you say generally that it was any of the industrial uses which require water front facilities?

A. That is correct.

Q. In that connection is there or is there not a material element in having a fairly large contiguous or solid piece of property? [246]

A. Yes, that is certainly a very material factor, and it is illustrated—not that this is the only case where that would apply, but it is illustrated by the very situation of the Concrete Ship Constructors. They could not have operated on five acres. Consequently, the fact that you

(Testimony of Edwin A. Mueller)

have a large parcel certainly adds to the value of the composite package, as you might say. That is called an added plottage value, and it is demonstrated in the case of the present use, although I can cite other examples.

Q. Is it true with respect to that that for industrial purposes or large-area industries that an added value is occasioned by reason of a larger acreage? A. Yes.

Q. Now, in arriving at your values of the property, do you consider it as a fee title? A. Yes.

Q. Do you consider it as salable for the purpose of the question at the time of the taking?

A. I have been so instructed, that we must consider it salable. Otherwise we could not set a value except on the use to the owner, which is not permitted. So I so consider it.

Q. Taking into consideration, Mr. Mueller, all of the factors which you have considered, did you arrive at a valuation of the entire parcel as of November 10, 1942?

[247] A. I did, yes.

Q. In arriving at that valuation, what valuation did you seek to put upon it? I mean, did you use market value?

A. You mean you would like to have me define market value?

Q. Well, I want to know first if you used it as your basis. A. I did, yes.

Q. Now, give your definition of market value.

A. Market value is the highest price, expressed in terms of money, which a piece of property will bring if exposed to sale on the open market by a seller who is not compelled to sell to a buyer who is not compelled to buy, both parties having full knowledge of all of the uses to

(Testimony of Edwin A. Mueller)

which the property is adapted, and with a reasonable length of time to make the sale.

Q. Using that market value which you have defined as the test, what, in your opinion, was the market value of the entire subject parcel, eliminating therefrom this Parcel 4 as of November 10, 1942?

Mr. Landrum: That is objected to, if your Honor please. It is objectionable as to form, in that it includes within itself an increase or an increment in the value due to the work which had been done upon it prior to that time.

The Court: The objection is overruled. [248]

The Witness: I have arrived at a value. May I explain my answer, your Honor?

The Court: I would prefer to have you answer it, and then if you want to explain it later on, you may do so.

The Witness: The answer is \$617,900 for the land in 1942, without regard to improvements; and \$685,000 for the land in 1942, but taking Area A in 1944, as its condition then existed.

The Court: He didn't ask that, but I think that is a short circuit. He would ask it and I suppose the government will object to it?

Mr. Landrum: Yes, your Honor.

The Court: So we will overrule the objection and permit the answer to stand.

Q. By Mr. Monroe: Now, you were about to explain that answer. What explanation do you have?

A. I explained it in my answer.

Q. You have explained it? A. Yes. sir.

Q. Now, as I understand it, in arriving at those values you have eliminated any question of the value of

(Testimony of Edwin A. Mueller)

the structures that were placed on the property?

A. That is correct.

Q. So that it is merely for the land itself?

A. That is correct. [249]

Q. Now, you have given an increased value of area A as of October 1944; is that correct? A. Yes.

Q. What factors do you consider as bringing about that increase in value?

A. The increase in value was occasioned by the fact that certain dredging had been done and that the property had a higher utility.

Q. Was there also considered any general increase of market values in property in San Diego?

A. There was a very definite increase, in my opinion, in the market values between 1942 and 1944.

Q. And would that increase affect this entire property? A. In my opinion, it would.

Mr. Monroe: You may inquire.

The Court: I believe we will have the cross examination in the morning.

Mr. Landrum: Whatever your Honor wishes.

The Court: Ladies and gentlemen, we will take a recess until half-past 9:00 in the morning; half-past 9:00 and not 10:00 o'clock. Remember the admonition and keep its terms inviolate. [250]

(The following proceedings were had outside of the presence of the jury:)

The Court: All jurors will leave the court room. I think the record may show now they are all out.

Mr. Monroe: The defendant National City offers to prove by the testimony of the three witnesses last on the stand that, as of October 2, 1944, the market value of the subject property, the entire tract taken as a whole, had increased approximately 50 per cent over and above the values that were given as of 1942, basing this offer, your Honor, upon the theory that the actual taking of the property was in October, 1944, and that the original use of which this property was sought to be taken, was, by the condemnation action started, abandoned, and that, in 1944, by the determination of the government authorities, they knew a different use was determined upon.

Mr. Landrum: The offer is objected to upon the ground and for the reason it is improper in form; second, that it assumes an improper date of valuation; third, that it includes within itself an increase and element in the value of this property due to the very work the government itself has done there and the expenditures of government money prior to that time.

The Court: It will all be disallowed.

Mr. John M. Martin: If the court please, I was going to ask the question as to whether it did include such. The offer [251] of proof is not clear to me, whether it is based on enhanced value or the value of the improvements placed.

Mr. Monroe: It is not on the value of improvements placed.

Mr. John M. Martin: Very well.

The Court: We will take a recess until 9:30 tomorrow morning.

(Thereupon, at 5:00 o'clock p. m., a recess was taken to 9:30 o'clock a.m., Wednesday, February 19, 1947.)

San Diego, California, Wednesday, February 19, 1947.

9:30 A. M.

The Court: All present. Proceed.

EDWIN A. MUELLER,

called as a witness by and on behalf of the defendant National City, having been previously sworn, resumed the stand and testified further as follows:

Cross Examination

By. Mr. Landrum:

Q. Mr. Monroe, I believe that on yesterday on direct examination you discussed with us the question of whether or not property in a larger parcel or a large parcel might sell to greater advantage or for more money than were that same parcel divided up into smaller parcels. You did discuss that? A. Yes.

Q. And I believe you used the word plottage value, didn't you? A. Yes, I did, I believe.

Q. What is plottage value?

A. Plottage value is the advantage that a larger parcel or an assembly of parcels has over individual parcels.

Q. What you mean by plottage value is that if someone wanted a parcel of land of, say, 100 acres, you would plot it into a larger parcel by acquiring the smaller parcels? [254] A. That is right.

Q. So it is your opinion, as I understand it, that a larger parcel of land such as this would sell for a greater value than were it divided up into smaller parcels and sold as such?

A. Yes, it is, although I did not ascribe any greater value to this parcel for that reason.

(Testimony of Edwin A. Mueller)

Q. That is what I was trying to get at. As a matter of fact, it is entirely probable that you find buyers easier for smaller parcels and get more money than you would for larger parcels?

A. Yes, and that proves exactly what I mean by plot-tage, because when you have smaller parcels and you start to gather up—for instance, I happen to know when they were gathering parcels for Consolidated, they might gather up 10 parcels and by that time the owners of the next 10 had notice that someone was in the market, trying to acquire property for some purpose or other, and they immediately raised their price, so their overall average was, therefore, increased.

Q. But let us assume we might have a buyer for a little piece like the Johnson piece, do you think he might be interested in the larger piece?

A. I couldn't argue at all that there aren't more customers for smaller parcels than there are for larger pieces. Well, certainly we can agree to that. [255-6]

Q. By Mr. Landrum: Now, of course, in arriving at your conclusion with relation to the fair market value of this property, you knew and realized that the San Francisco Bridge Company had a lease from the City of National City covering what I am now pointing to on Plaintiff's Exhibit No. 1 as Parcel 7?

A. Yes; I did.

Q. And, also, that the San Francisco Bridge Company had a lease from the City of National City covering that portion of Parcel A to which I am now pointing, and comprising, as I understand it, approximately eight acres? You knew that, didn't you? A. Yes.

(Testimony of Edwin A. Mueller)

Q. State whether or not, in your opinion, the fact that the San Francisco Bridge Company had such a lease detracted from or added to the value of the whole as you fixed it.

A. My answer is that I appraised the entire property regardless of the lease.

Q. Then, you gave no consideration, in so far as dollars and cents are concerned, to the lease of the San Francisco Bridge Company?

A. Oh, yes; I made an investigation of the lease and studied it but, when I made my appraisal of that property, I included the lease as well as the fee to the land. [257]

Q. How much did you include by virtue of the fact that they had that lease in there or how much did you detract from your value?

A. I neither included nor detracted anything from my value because, by the terms of the lease, it still is not determined, as far as I can see, what the consideration was for the lease.

Q. Calling your attention now, again, to Parcel 7 as depicted on Plaintiff's Exhibit No. 1, by the giving of that lease to the San Francisco Bridge Company, the City of National City actually severed, in so far as this back land is concerned, that back land from the water, didn't it?

A. No; I don't agree to that.

Q. Well, come and look at it on this map with me.

A. I would agree with you if they had given the San Francisco Bridge Company Parcel 2 up to the property line and Parcel 7 down to the pier head line, so that they would have been completely blocked off from the water.

Q. Then, as I understand it, you say that you did not consider that as being detrimental to the back land by

(Testimony of Edwin A. Mueller)

reason of the fact that a person owning Parcel 2 or owning Parcel 3 might get out to the water up here or down here?

A. I didn't consider it as detrimental—I didn't give it any consideration because I appraised the fee.

Q. But it is a fact, is it not—just come here a [258] moment, please—it is a fact, is it not, that, should someone desire to purchase what is designated on Plaintiff's Exhibit No. 1 as Parcel 2, they would have no access to the water whatsoever because of the fact they couldn't get across that San Francisco Bridge Company's lease?

A. If you carve Parcel 2 out alone, that would probably be the fact.

Q. And as to Parcel 2, Parcel 6 and Parcel 3, they would have to come into the water either through this way or proceed down this way on Parcel 3?

A. I want to again repeat that the property was all in one ownership and I so considered it.

Q. Now, in arriving at your conclusion with relation to the fair market value of this property, I take it that you made a complete investigation of the sales of property which you considered comparable in that locality?

A. I made an investigation of sales of property in the industrial area of San Diego and National City and I made a very careful study of leases, tideland leases.

Q. Let's discuss that situation just a moment. Is it your opinion that here in the City of San Diego you find in this situation as it exists here sales that are comparable to the sale of this land in the City of National City?

A. May I have that question again?

(Testimony of Edwin A. Mueller)

(Question read by reporter.) [259]

A. When you use the present tense, do you mean as of the date of taking?

Q. Yes, sir. Just answer me yes or no, please

A. My answer is yes, subject to this explanation—

Q. That is right.

A. My explanation is this, that, between 1940 and 1944, San Diego grew industrially more than it grew in its entire 80 years of life as a pueblo and a city before that; that the impact had not hit National City and beyond there until 1942, which was starting to strike then, and hadn't completely struck until 1944.

Q. What made it strike?

A. Why, the necessity for additional industrial sites.

Q. The necessity of the government of the United States?

A. No. Now, just a minute; I did not state that.

Q. I know you didn't. I asked you that, sir.

A. No, sir. [260]

Q. All right. Thank you. Now, of course, in your investigation you knew of and did thoroughly investigate the sale which Mr. Anewalt and Mr. Hotchkiss gave us from that witness stand on yesterday, didn't you?

A. I knew of the sale, but I didn't give it a great deal of weight as connected with this, because it is entirely different type of property. This is water-front property. It has access to the water. The other doesn't have. It is entirely different.

Q. As a matter of fact, isn't it a fact that when they talked about that sale, they gave us a sale of improved

(Testimony of Edwin A. Mueller)

property with buildings and warehouses and brick buildings upon it?

A. Well, I didn't—I wasn't listening particularly to what they gave you. They gave you a sale of certain property down there. I have the sale down here in my list.

Q. All right. You have that sale in your list. Calling your attention to lots 1 to 10, inclusive, and lots 18 to 21, inclusive, in block 280 and all of block 281 in the City of National City, did you have knowledge of and did you take into consideration the sale of that property by the San Diego and Arizona Eastern Railway Company to the Plywood Structures, Inc., under date of April 1, 1942?

A. My answer is yes, I had knowledge of it. I took it into consideration. I gave it no weight as compared to this [261] property.

Q. How much did they pay for it?

A. According to my records, \$33,000.

Q. In 1942? A. April 1, 1942.

Q. Are you positive of that, sir?

A. That is my record.

Q. Isn't it a fact that they paid \$3,000?

A. No. I secured this information from Mr. Anewalt. I gave no weight to the sale anyway.

Q. Now, I don't want to confuse you. The valuation which Mr. Anewalt gave was a sale in 1944, wasn't it?

A. That may be true.

Q. Check again and see if you have that 1942 sale, please, sir.

A. I have a sale of that particular piece of property at \$33,000.

(Testimony of Edwin A. Mueller)

Q. Do you have one on April 1, 1942?

A. This is the one that I have ascribed to April 1, 1942.

Q. All right. We will check it. Thank you, sir. Now, what is the date of that sale again that you have there? April 1, 1942?

A. That's right.

Q. Are you positive that the date of that sale is not [262] the 13th day of April, 1944?

A. No, I am not.

Q. You are not positive?

A. There might have been a subsequent sale.

Q. Mr. Mueller, do you have an opinion of the market value of the lands with which we are here concerned, known as the National City lands, as of August 27, 1942, for all uses for which it was on that day suitable or adaptable, but not including therein any increase or increment in that value due to work done before that in the construction of this shipyard project? A. I do.

Q. And what is your opinion of that value?

A. \$617,900.

Q. I will ask you to state whether or not prior to the 27th day of August, 1942 changes had been made, particularly in connection with dredging and leveling of the land, which were not there when this land was in the ownership of the City of National City.

A. The answer is no, subject to this qualification: the land was, as I understand it, in the ownership of National City right up to November 10, 1942. Now, much of that work had been done up to November 10, 1942.

Q. That is right, but I fear you did not understand my question. The question, as I put it to you, was

(Testimony of Edwin A. Mueller)

[263] this: do you have an opinion of the fair market value of the land with which we are here concerned, known as the lands of the City of National City, as of August 27, 1942, for all uses for which, in your opinion, it was suitable and adaptable, leaving out of your figure, however, any increase or increment in that land due to work, dredging, leveling, and so forth, which had been done on there prior to that time as a part of this very project?

A. Yes, that is the figure that I just cited to you a few moments ago.

Q. In other words, you did not include anything for work that had already been done?

A. No, sir, I did not.

Q. That is what I want clear. So what you have given us is your opinion of the fair market value of this land as it stood on August 17, 1942, leaving out of consideration, however, any work that had been done by expenditure of money on it by persons other than the City of National City.

A. That is correct.

Q. That is right. Now, should I ask you that same question with relation to the valuation which you have given us as of the 23rd day of December, 1944, or as of the 3rd day of October, 1944, would your answer be the same?

A. No. [264]

Q. All right.

A. And for this reason: I made no appraisal, as far as the City of National City is concerned, except on the date of the taking by the government of those parcels, all parcels except area A. Area A was taken subsequent to the other parcels, so I would have a different opinion of the value of area A.

(Testimony of Edwin A. Mueller)

Q. All right. Now, I want to clear that up. Then, as I understand your answer to the question, in so far as parcel A is concerned, assuming and accepting the date of October 3, 1944, or assuming and accepting the date of December 23, 1944, you have included within your value there an increase in the value of that property due to the construction of this shipyard itself; is that right?

A. No.

Q. Then explain to me what you meant when you said you did.

A. I testified yesterday as to two figures. The first figure was \$617,900, and the second figure was \$685,299. The difference was occasioned by the change in the character of area A.

Q. What brought about that change in the character of area A? A. The dredging.

Q. The dredging? [265] A. Yes, sir.

Q. How much have you included in your figure, your larger figure which you have given us, by reason of the dredging and the work which had been done on it in the construction of this shipyard?

A. Now, just a minute. Let's understand one another. I am not talking about the construction of the shipyard. I disregarded that entirely. I am talking exclusively about the dredging in area A.

Q. Well, the dredging of area A was a part of the construction of this shipyard? A. But not all.

Q. But a part of it; that is right, isn't it?

A. No, not even part of it. Some dredging was done by people other than the Concrete Shipbuilders and other than the United States Government.

(Testimony of Edwin A. Mueller)

Q. All right. Let's get down to this: Have you included anything in there by virtue of the dredging which was done by the Concrete Shipbuilders and the United States of America?

A. Again, going back to my testimony of yesterday, I gave a figure of the property value without regard to any improvements put on by Concrete Ship or by the Government of the United States, and I gave a figure, taking into consideration the dredging that was done by the Government of [266] the United States or Concrete Shipbuilders, and my figure including the dredging was \$685,000.

Q. How much is it excluding that dredging?

A. \$617,000; the difference.

Q. Now, in 1944? A. Yes.

Q. All right. Then we get it clear. The difference between your figure of \$617,000 and your figure of \$685,000 as of 1944 is brought about and is constituted by virtue of the fact that those moneys were expended upon it in the construction of this shipyard; that is right, isn't it? A. Yes.

Q. Do you in your answer give to the owner of this property, the City of National City, the benefit of the moneys spent on there in that dredging?

A. I do not. [267]

Q. Well, I don't understand you. Why did you add it in there, then?

A. Because I was asked the question to estimate the condition of the land in 1944 as dredged and I was also asked to ascertain its condition without the dredging, and I prepared the two answers in anticipation of that.

(Testimony of Edwin A. Mueller)

Q. Is this fair, that the difference between your two figures, 617,000 and 685,000, is by virtue of that dredging that was done by the Concrete Ships?

A. Yes; that is right.

Q. Is that the same figure that you gave us for a 1942 valuation? A. No.

Q. What figure did you give us for this over-all valuation of all of it in your 1942 valuation?

A. \$617,000.

Q. That is the same figure, isn't it?

A. That is right.

Q. Is it your opinion that there had been no increase in land values in that locality which were reflected in this property between 1942 and 1944?

A. It is my opinion that there was a very definite increase in land values but I did not describe any increase in the value of Area A as between 1942 and 1944 because, in 1942, Area A was in a comparatively unuseable condition and it was [268] made useable by the dredging in that interval of time.

Q. As a matter of fact, the value that was reflected in Area A is almost solely due to the money that was spent in there in constructing this shipyard, isn't it?

A. That is all I allowed, in an effort to be perfectly fair with the government.

Q. That is right. Thank you, sir. That is all.

Redirect Examination

By Mr. Monroe:

Q. You have been asked about a sale on April 1, 1942. What data do you have on that sale? A. I have—

(Testimony of Edwin A. Mueller)

Mr Landrum: That is objected to, if the court please. The witness has already stated that he had no data on that sale.

The Court: I don't know whether he meant to be understood that way or not.

The Witness: I have some data on this sale but, apparently, it is confused as between two sales, the one a sale and a resale.

Q. By Mr. Monroe: What sale was it in 1942 that you were speaking of, April 1, 1942?

A. That was, as I understood it, the sale from the Plywood Corporation—or a sale from the San Diego, Arizona & Eastern Railway to the Plywood Structures. [269]

Q. And what property was that?

A. That was a portion of the block bounded by 24th and 25th Streets and Harrison and Cleveland Avenues in National City.

Q. And how big a piece would that be?

A. 50,000 square feet approximately; over 50,275 square feet.

Q. And that was how much money?

A. My record is \$33,000.

Q. Where is that located with reference to this property? A. I would say within a quarter of a mile.

Q. Is it water front property?

A. No; it is not.

Q. Does it have access to the Bay at all?

A. It has not.

Q. Is it, in your opinion, comparable to the type of property involved in this suit?

A. No; it is not.

(Testimony of Edwin A. Mueller)

Q. Mr. Mueller, there have been a number of questions asked you about the situation as to the lease of a portion of this property. In arriving at your conclusions, did you consider this as one parcel of land?

A. I considered it absolutely as one parcel of land, in one ownership. [270]

Q. And as passing to one purchaser?

A. That is correct.

Q. In making estimates of the value of a leasehold in such cases as you do make estimates of such values, what do you consider as furnishing any particular value to the leasehold?

A. I am disregarding any question of improvement—

Mr. Landrum: That is objected to, if the court please, upon the ground it is not proper redirect examination.

Mr. Monroe: There have been a lot of questions asked about how that affected the value of this property, and I want to show—

The Court: I think perhaps, technically speaking, it is not redirect examination but I will permit counsel to interrogate the witness about it. Overruled.

The Witness: I am sorry but I don't understand your question.

Q. By Mr. Monroe: Let me reframe it, Mr. Mueller. In considering values of a leasehold as separate from the value of the interest of the owner, if the rental payment is the full rental value, do you consider that has any particular bonus value? A. No; I do not.

Q. And it is only when the lease calls for a rental less than the rental value that it does have a bonus [271] value? A. That is correct.

(Testimony of Edwin A. Mueller)

Q. When, however, you sell both the interest of the landlord and the interest of the tenant in one sale, is the sum of the value of the owner's interest and the value of the tenant's interest still the reasonable market value of the property? A. It is.

Q. So that, when they are both sold together, it makes no difference?

A. The only problem there is as to how much the tenant or the lessee is entitled to and how much the owner is. But it is all included in the one figure.

Q. The two of them can't make more than the one figure? A. That is correct.

Mr. Monroe: That is all.

Recross Examination

By Mr. Landrum:

Q. How much did you put in, then, for the lessee, the San Francisco Bridge Company?

A. I didn't put any value in for the lessee. I didn't estimate it because I estimated the value of the fee, and I included within the whole in that case all of its parts.

Q. Then, as we understand it, you reached a conclusion that, in so far as the San Francisco Bridge Company was concerned, it had no bonus value and it couldn't be sold for any bonus more than they were paying, is that it? A. No, sir.

Q. Why not?

A. Because I appraised the fee of the land, which includes all of its parts.

Mr. Landrum: That is all.

Mr. Monroe: That, your Honor, is all the testimony we care to introduce at this time.

The Court: Ladies and gentlemen, it may be that some of you feel that you should make notes or keep track of the figures given. You are permitted to do that, if you desire, but you must keep the notes to yourselves individually and for your own convenience. I apprehend, without knowing it, that counsel in their summation at the conclusion of the case will prepare diagrams which will illustrate these various items and the various estimates which have been given by the various expert witnesses, and that you will have the benefit of that. But, if you desire, in addition, to make your own notes, you may do so. But that should be confined, however, to figures and should be kept by the individual jurors, and not any explanatory statement that is not pertinent to that. In other words, we have a record here that shows what took place and we must accept the official record of what has taken place. Proceed, gentlemen, for the San Francisco Bridge Company. [273]

Mr. Sloane: May I make a short opening statement, your Honor?

The Court: Yes; you may.

Mr. Sloane: If your Honor please, and ladies and gentlemen of the jury, this piece of land down here is at the south end of the Bay. As you have had demonstrated here, the San Francisco Bridge Company is interested only in Parcel 7 on the shore, the area in blue, and in part of Parcel A, the water area, which is included in the extended lines of its boundaries, that is, a slightly squashed parallelogram of water, which the evidence will show contains about eight acres, or a total of almost 14 acres of land and water.

We will, with the permission of the court, put in the lease in evidence and give you some definite details on

these matters that have been alluded to but are not clearly before you as yet.

We seek to keep ourselves as free from involvement as possible in these larger or questionable matters as to overall values, confining ourselves to what the San Francisco Bridge Company had in November, 1942, which was an unexpired lease under which they could retain the property for an ensuing period of 18 years. In other words, I am talking to you now and my witnesses will talk to you merely about an 18-year right of occupancy in this area, Parcel 7 and the south-easterly corner of Parcel A. I will call Mr. Hinds. [274]

BARRETT G. HINDS

called as a witness by and on behalf of the defendant San Francisco Bridge Company, having been first duly sworn, was examined and testified as follows:

The Clerk: Please state your name.

The Witness: Barrett G. Hinds.

Direct Examination

By Mr. Sloane:

Q. Mr. Hinds, are you connected with the San Francisco Bridge Company, one of the defendants in this action? A. I am.

Q. In what capacity?

A. I am the president of the company.

Q. How long have you been connected with the company? A. Since the fall of 1923.

Q. Has the company done work in and about San Diego Bay in the past? A. Yes.

(Testimony of Barrett G. Hindes)

Q. Over what period?

A. Off and on during the entire time or period of my employment by them and prior to that time say for a period of 30 years.

Mr. Sloane: In order to pictorially show what part the San Francisco Bridge Company has had in the development of San Diego Bay, as well as to illustrate the particular [275] area, I offer in evidence United States West Coast of California Chart of San Diego Bay, being the edition of July, 1942, according to the inscription thereon.

Mr. Landrum: There is no objection to it when I get a number for it, your Honor, for my records.

The Clerk: San Francisco Bridge Company's Exhibit K.

Mr. Landrum: Could I ask what letter or number you gave it?

The Clerk: Exhibit K.

The Court: It will be received and so marked.

(The document referred to was received in evidence and marked defendant San Francisco Bridge Company's Exhibit K.)

[Defendants' Exhibit K—Map. See original.]

Q. By Mr. Sloane: Are you familiar with this chart which has been marked Exhibit K? A. I am.

Q. And, in a general way, what does it depict?

A. It depicts an indication of the Harbor of San Diego, with the land areas and the water areas, together with the depths of water in such areas.

(Testimony of Barrett G. Hindes)

Q. As of what date?

A. As of about the middle of 1942. I think the month is stated on there.

Q. Was the San Francisco Bridge Company engaged in dredging San Diego Bay in the summer of 1942 and there-[276] after?

A. Not in 1942. We had completed certain work at that time and were working in other locations at that time.

Mr. Sloane: In order to save the witness from stepping down, may I indicate here a white streak running down the center of the Bay?

Q. Will you indicate what that designates?

A. That is entitled the main channel.

Q. Deep water channel?

A. Yes; deep water channel.

Q. What is the area shown in white?

A. The area which you indicated has marked on it a depth of 30 feet.

Q. Taking the channel opposite what we call the subject land, which is the south end of the white area on the map, what was the depth of the water there in the summer of 1942? A. 30 feet below mean low low water.

Q. Did your company have any part in dredging that area?

A. Yes; we dredged this area as I indicate, the southern portion of the main channel of the Harbor, under contract with the United States of America.

Q. That would be approximately beginning at the ferry crossing and extending southerly? [277]

A. A little south of the ferry crossing and extending southerly to National City.

(Testimony of Barrett G. Hindes)

Q. To a point opposite the southerly boundary of the subject land? A. Correct.

Q. Will you tell us what was done with the spoil or mud that came out of that area?

A. It was deposited in several locations. There was a portion of it filled in this area here at Coronado. This rectangular area was constructed and this fill in here was constructed, including these two moles. The two moles were constructed under a supplemental agreement from the Army Engineers, as it was not a portion of the regular contract.

Q. Picking up the latter part of your statement, then, do I understand that the San Francisco Bridge Company took soil out of the Bay area and deposited it on the subject land back of the bulkhead line?

A. That is correct.

Q. That was prior to 1942?

A. That is correct. That entire area was mud flats until the time that we constructed these fills both for the United States and for the City of National City.

Q. When you speak of mud flats, will you describe the condition of the subject land before any filling was done, in a general way? [278]

A. It was an area extending from dry land out to deep water, or I should not say deep water but there was a gradual slope from the dry land out to the central portions in the harbor, and a large portion of this area was what is known as above low tide. In other words, as the tide would go up and down, it could cover and uncover as you have frequently seen, and then from that low tide point it sloped gradually. I think that the outer end of

(Testimony of Barrett G. Hindes)

the subject properties was somewhere in the neighborhood of three to four feet of water.

Q. That is, the westerly edge of what is known as Area A? A. Yes.

Q. Now, bringing it down to November, 1942, will you describe the condition particularly of Parcel 7 and the southerly portion of Parcel A? Or let me interrupt. I will withdraw that question. The San Francisco Bridge Company obtained a lease from the City of National City on the 10th day of October, 1940?

A. That is correct.

Mr. Sloane: We offer in evidence a photographic copy, which is kindly accepted by counsel, of a tideland lease, dated October 10, 1940, executed by the City of National City, hereinafter referred to as the City, and San Francisco Bridge Company, hereinafter referred to as the Company. For the sake of brevity, if I may, I will refer to that organization [279] as the Company hereafter.

Mr. Landrum: As I understand it, your Honor, the exhibit has been marked or will be marked Defendant's Exhibit L, and there is no objection to it. It is a photographic copy but we don't raise that question at all.

The Court: It may be received and so marked.

(The document referred to was received in evidence and marked defendant San Francisco Bridge Company's Exhibit L.)

[Defendants' Exhibit L—Lease pertaining to interests of defendants other than appellants. See original.]

(Testimony of Barrett G. Hindes)

Mr. Sloane: We also offer a contemporaneous agreement, dated October 10, 1940, executed by the San Francisco Bridge Company, a corporation, and the City of National City, entitled "Memorandum of Agreement," that being also a photographic copy.

Mr. Landrum: There is no objection to Defendant's Exhibit M, your Honor.

The Court: It will be received and so marked.

(The document referred to was received in evidence and marked defendant San Francisco Bridge Company's Exhibit M.)

[Defendants' Exhibit M—Lease pertaining to interests of defendants other than appellants. See original.]

Q. By Mr. Sloane: Did your company have any interest in the subject area prior to that date in 1940, October, 1940?

A. We had been working with the City of National City, for some time prior to that, in order to prepare this and come to an agreement. [280]

Q. You had been negotiating—

A. We had been negotiating and our interest was merely in that. [281]

Q. Now, will you tell us on October 10, 1940, what was the condition of the lands, taking as a reference point the bulkhead line which, as I understand it, separates parcel A from parcel 7? A. Yes.

Q. What was the depth of water there at the mean low low tide? A. In October, 1941?

Q. 1940, I believe, is the date.

A. In October, 1940, it was along the bulkhead line. Probably the ground was four or five feet above low tide,

(Testimony of Barrett G. Hindes)

but there was no water adjacent to the bulkhead line except on high tides.

Q. Where was the nearest deep water, meaning by that a channel amounting to 10 feet in depth at low low tide?

A. Approximately 1,000 feet out to the west—no, in October the dredging had not been completed to that point yet. It was progressing from north to south, and it was probably 1,500 to 2,000 feet to the northwest of the subject area.

Q. Under whose direction was this progress going forward?

A. The work was being done by the San Francisco Bridge Company.

Q. Was that under contract? [282]

A. That was under contract.

Q. And the contract called for dredging how far south?

A. To a point approximately opposite the lower—the south end of the subject area.

Q. Now, describe to us the condition of the land eastward and southward of the bulkhead line, as shown on Plaintiff's Exhibit No. 1.

A. The land to the eastward was in the process of filling. The land to the south was the original existing mud flats.

Q. Without taking the time to read to the jury this memorandum of agreement, will you tell us what relation that had to dredging in area A and depositing land in parcel 7 and parcel 3?

A. You are referring to the terms of this memorandum agreement with the City of National City?

(Testimony of Barrett G. Hindes)

Q. Yes, in a general way.

A. That agreement recites certain conditions which the San Francisco Bridge Company agreed to as a basis of the granting of the lease, and the prime considerations in that agreement were the filling in of the north mole. I think the other drawing there shows.

Q. The north mole?

A. The filling in of the north mole.

Q. Referring to a project on the land and out into [283] the water— A. That is correct.

Q. —at the north of the subject area?

A. That is correct. The filling of the south mole on which parcel 7 is partially located, and the dredging of a portion of area A approximately 500 feet by 1,000 to a depth of not less than 9 feet below mean lower water,

Q. Is that approximately the area which I outlined with the pointer now on the chart?

A. That is a portion of it, and then it extends further westward to connect with the deeper water in the channel.

Q. It goes further to the west? A. Yes.

Q. Now, did you perform the requirements placed on you by this collateral agreement? A. We did.

Q. Perhaps we can get it by asking you what you did pursuant to that agreement.

A. We made two mole fills, in accordance with the agreement with National City, and as further directed in the permit which was received from the Army Engineers, who have control over such works, and then we dredged the basin, what we call the basin, which is that 10-foot area at the southerly portion of area A.

Q. I will show you an enlarged portion of the chart, [284] which purports to depict parcel A, the southerly

(Testimony of Barrett G. Hindes)

portion of parcel A and all of parcel 7, and ask you if that is a correct reproduction of the land and water area in which our company is interested.

A. Yes. That is a drawing made at my office under my direction.

Mr. Sloane: We will offer that in evidence.

Mr. Landrum: Your Honor please, there are just one or two matters I would like to ask counsel about, as to what they are, and then I think I could—

(Conference between counsel off the record.)

Mr. Landrum: As I understand it, that will be Defendants' Exhibit N, your Honor, and there will be no objection to it.

The Court: So ordered.

The Clerk: Defendants' N.

(The document referred to was marked Defendant San Francisco Bridge Company's Exhibit N, and was received in evidence.)

[Defendants' Exhibit N—Map. See original.]

Q. By Mr. Sloane: Defendants' N now shows in enlargement and in a little more detail what appears on the other charts as the land area of parcel 7 which you had under lease? A. Yes.

Q. And that portion of parcel A which was included in [285] your lease? A. Correct.

Q. It being understood that the rest of parcel A extends to the north and to the west?

A. That is correct.

Q. Does the blue-shaded area and the green-shaded area correctly portray the land and water which the San

(Testimony of Barrett G. Hindes)

Francisco Bridge Company took into possession on the 10th of October, 1940?

A. It includes the areas which were to be land and were to be water.

Q. At that time they were mostly water?

A. At that time they were mostly water and mud.

Q. Now, after your work was completed—by the way, when did you complete the work which was called for under the memorandum agreement, the collateral agreement?

A. It was completed in February, 1941.

Q. So if I move up to that date, I may speak of the green-shaded area as water, and the blue-shaded area as land?

A. That is correct.

Q. And the dividing line is then the bulkhead line, so far as it extends northerly and southerly?

A. Yes, that is the bulkhead line; the bulkhead line as established by the United States Engineers Department.

Q. Actually did the land fill out entirely to the [286] bulkhead line?

A. No.

Q. What was the condition easterly of the bulkhead line?

A. You see, the dredging was done in such a manner as to have approximately the required depth on the bulkhead line, and then there is a slope from that which slopes up to the high ground on what they call,—well, it is steeper than the natural slope, because we filled it in and dredged the toe off to make it as steep as possible, to minimize that slope area.

Q. Did that make a usable water front?

A. Oh, definitely.

(Testimony of Barrett G. Hindes)

Q. And your company actually used it?

A. Yes, sir.

Q. Now, tell us the extent of the dredging which was done in the green-shaded portion of parcel A. What dredging did you do prior to November, 1942?

A. We did all of it there.

Q. We want to know how much was done, to what depth of water.

A. It was dredged to somewhere between, due to the inaccuracies of the dredging processes, between 10 to 12 feet.

Q. Your contract called for a depth of 10 feet?

A. Called for a minimum depth of 9 feet. [287]

Q. Of 9 feet. You actually went beyond that?

A. That is correct.

Q. There was some talk here about depth below mean low low water.

A. That is what I refer to.

Q. That doesn't mean—or, let me put it in terms of a boat. When you had that dredging completed in accordance with your contract, how large a boat could go in, referring to the depth of the water which the boat would draw at ordinary low tide?

A. At ordinary low tide, 10 feet.

Q. It would be safe to navigate that area with a 10-foot draft vessel?

A. That is correct, at ordinary low tide.

Q. At high tide, how much more water would there be?

A. About 5 to 6 feet.

Q. Did you erect a pier of some kind, which is indicated by this brown structure here?

A. Yes. That was a wharf we built on account of servicing our equipment, which was 100 feet long by 30

(Testimony of Barrett G. Hindes)

feet wide, together with an approach over the slope to shore.

Q. Do you have photographs of that structure as it stood on November 16, 1942?

A. Yes, there are some.

Q. I show you a photograph and ask you what view that [288] gives of the pier which is depicted on Exhibit N?

A. That is taken from just about the angle point, right in there. It is looking across the wharf. That should be to the northwest.

Q. Very well. Will you tell us what it shows?

A. It shows the wharf, together with the approach, and I might comment that it shows the semi-permanent construction of the piles, being encased in concrete, in order to assure long life.

Q. Was your company using that here in November of 1942?

A. We were bringing our equipment in there at the time, and it was in use until we were kicked out.

Mr. Sloane: I offer in evidence the photograph just identified.

The Clerk: Defendants' Exhibit O.

Mr. Landrum: There is no objection to Defendants' O, your Honor.

The Court: So marked and received.

(The document referred to was marked Defendant San Francisco Bridge Company's Exhibit O, and was received in evidence.)

[Defendants' Exhibit O—Photograph of shipyard or portion thereof. See original.]

(Testimony of Barrett G. Hindes)

Q. By Mr. Sloane: I show you another photograph, which appears to be another view of the same edifice. Will you describe at what position that photograph was taken, and [289] when it was taken?

A. Yes. That was taken, I think, from about half way from the wharf to the west, and the point in there, looking to the northeast.

The Court: It was taken at the same time?

The Witness: On the same day; on the 16th of November, I believe, 1942.

Q. By Mr. Sloane: That would be looking from one portion of the land, parcel 7, across to the opposite portion? A. Across to the opposite side.

Q. Was there any change in the condition of those premises between the 10th day of November, 1942, and the date the pictures were taken?

A. No, because the work of the construction of the wharf had been completed appreciably prior to that time.

Q. Had the dredging been completed?

A. Oh, yes, the dredging had been completed in February, 1941, which was a year and a half ahead of this.

Q. That carried with it the filling of the dredging material in the areas designated by the City of National City and the Army Engineers?

A. That is correct.

Q. This reference to Army Engineers, is that anything peculiar to this part of the Bay, or does that attend on tidewater operations? [290]

A. The Army Engineers have a certain jurisdiction by law over navigable waters, and particularly in the changing of conditions of navigation, such as the deepening or the preventing of obstructions to navigation, and

(Testimony of Barrett G. Hindes)

they have, I would say, the jurisdiction over harbor areas, particularly from the pierhead lines out, and, also, in connection with any structures which might affect the flow of navigation in those areas.

Mr. Sloane: We offer in evidence the photograph last identified.

Mr. Landrum: There is no objection to Defendants' Exhibit P, your Honor.

The Court: So received and so marked.

(The document referred to was marked Defendant San Francisco Bridge Company's Exhibit P, and was received in evidence.)

[Defendants' Exhibit P—Photograph of shipyard or portion thereof. See original.]

Q. By Mr. Sloane: Mr. Hindes, will you tell us what was the reasonable value of the work which you did in pursuance of your agreements, as a part of the consideration for the lease?

Mr. Landrum: That is objected to, if the court please, as incompetent, irrelevant and immaterial, the reasonable value of the work.

The Court: Overruled.

Q. By Mr. Sloane: Referring to the dredging and [291] filling, primarily.

A. The dredging and filling had a reasonable market value of approximately \$57,000.

Q. With regard to the construction of the pier, will you tell us what was the reasonable value of that construction?

(Testimony of Barrett G. Hindes)

Mr. Landrum: That is objected to, if the court please, upon the ground and for the reason it is incompetent, the reasonable value of the construction of the pier.

The Court: Overruled.

The Witness: It would be \$13,000, including the dolphins, which are shown extending out from it, to which equipment was moored while being serviced at the pier.

Q. By Mr. Sloane: You refer to some brown dots in the water area? A. Yes.

Q. Tell us how a dolphin is made.

A. Well, a dolphin consists of a number of piles driven into the bottom. They are usually spaced a short distance apart, and then pulled together at the top above water, and ordinarily wrapped with wire or bolted, so as to close them together, which forms a kind of tripod-like, to give it lateral stability, and are used for tying up equipment to, or to keep the equipment from drifting. By equipment, I mean the vessels. [292]

Q. There were how many of those piles in place in November, 1942?

A. I believe there were six of those dolphins, and there are four piles in each dolphin.

Q. When did you relinquish that property?

Mr. Landrum: That is objected to, if the court please, as immaterial, when he relinquished it.

The Court: I don't think relinquishment is perhaps the best term.

Mr. Sloane: Very well. I will withdraw the objectionable word, your Honor.

Q. By Mr. Sloane: When did you move off of those premises?

(Testimony of Barrett G. Hindes)

Mr. Landrum: That is objected to, if the court please. I think counsel and I are not in disagreement, but—

The Court: The witness used an expression in his testimony. Perhaps that is more appropriate than the ones either one of you have used.

Mr. Sloane: I think that is an excellent word, but I hardly dared to use it.

The Court: Do you mean the same thing, Mr. Sloane?

Mr. Sloane: I am putting it in the same words, the same action.

The Court: The objection is overruled.

The Witness: We were notified of the taking, I believe [293] it was, the 10th of November, 1942, and arrangements were made so that we moved out as promptly as we could obtain other sites—I mean another place to put our stuff; and with regard to the physical moving of the equipment, from our records it indicates the last straw got out of there in about March of the following year.

Mr. Landrum: Well, as I understood it, your Honor, we were agreed on the date of valuation here.

The Court: I think that is true, but this is a feature which I think the jury should have in mind. It is similar to other lines of inquiry which are not especially pertinent to the ultimate question, ladies and gentlemen, but it may throw some light on it. For that reason you are entitled to hear it.

Q. By Mr. Sloane: On the 10th day of November, 1942, did you make an effort to locate other similar lands and water fronts in the harbor at San Diego?

Mr. Landrum: That is objected to, if the court please, as incompetent, irrelevant and immaterial.

The court: Sustained.

(Testimony of Barrett G. Hindes)

Q. By Mr. Sloane: Do you know whether or not on the 10th day of November, 1942, there were other unoccupied areas of land and an area similar to the subject parcel?

Mr. Landrum: I make the same objection, if your Honor please, with relation to his ability to secure another site. [294]

The Court: Objection sustained.

Q. By Mr. Sloane: Where did you move to?

Mr. Landrum: That is objected to, if the court please, for the same reasons, as incompetent, irrelevant and immaterial.

The Court: The same ruling. Sustained.

Q. By Mr. Sloane: Are you still here, Mr. San Francisco Bridge Company?

Mr. Landrum: That is objected to because it has already been testified to.

The Witness: Well, as I said before, I got kicked out on the street.

The Court: That is another one of the consequences of war, I presume.

Q. By Mr. Sloane: Well, do I understand that the San Francisco Bridge Company is still doing business in the Harbor of San Diego?

Mr. Landrum: That is objected to as incompetent, irrelevant and immaterial, whether they are or not.

The Court: I think they have a right to show the status of the entity. Overruled.

Mr. Sloane: That is the purpose.

The Witness: Yes, we have been doing business continuously in the San Diego area since that time.

(Testimony of Barrett G. Hindes)

Q. By Mr. Sloane: Going back to your duties as [295] superintendent of the San Francisco Bridge Company, will you tell us what experience you have had with tidelands and the occupancy of tidelands as of 1942, November, 1942?

A. Well, in November, 1942, the tidelands I was looking at were out in the middle of the Pacific.

Q. Where were you then?

A. I was in the Navy, sir.

Q. Were you assigned to a particular branch of duty, sir?

A. I was the Harbor Development Officer of the Service Squadron of the Pacific.

Q. When did you last see this particular area?

A. In February, 1941.

Q. Do you know whether any dredging was done on the indicated part of parcel A after the San Francisco Bridge Company got through?

A. Yes. I have examined the records and have determined that dredging was done there in area A after the time I was here and after the Bridge Company did their dredging.

Q. Do you know when it was relative to the date in 1942? Was it before or after November, 1942?

A. It was commenced prior to November 10, 1942; I think in August.

Q. I am speaking now of the southerly portion of parcel A, the water included in your lease. [296]

A. Oh, no, I don't believe that the dredging actually got into our area until after the taking by the government.

(Testimony of Barrett G. Hindes)

Q. Who was doing the dredging in that vicinity? I mean what concern.

A. The dredging was being done by the Case Construction Company. I don't know who was paying for it. I understand the Concrete Ship Constructors.

Q. I just wanted to know who was doing it. The Case Construction Company? A. Yes, sir.

Q. Did they have a dredge in that vicinity prior to November 10, 1942? A. Yes.

Q. You think it was or was not within your water area at any time prior to that date?

A. I don't believe it was.

Q. Where were they working?

A. Just north of this area.

Q. In your duties with the company, have you had occasion to familiarize yourself with tidelands occupied by persons other than the San Francisco Bridge Company? Take the water front of San Diego. Do you know, in a general way, who occupies it, or whether it was occupied as of 1942?

A. Well, the water front of San Diego is, I would say, very populously occupied. The fact is it seems to be pretty [297] continuous from one end to the other, by observation.

Q. In November, 1942, were there any unoccupied tidelands on the easterly shore of San Diego Harbor, fronting on deep water, which was not under occupancy?

A. I can't tell you that. I understand there was very little.

Q. At that particular time you were not here, I believe? A. That is correct.

(Testimony of Barrett G. Hindes)

Q. You say you had some negotiations extending over some period of time prior to signature of this lease with the City of National City?

A. That is correct.

Q. Did you take part in those negotiations?

A. I did personally, yes.

Q. In the course of those negotiations, did you have occasion to investigate rentals and rental values on the harbor front of San Diego?

A. Yes, because we—in the dredging business there is a large amount of equipment and attendant plant, which is, a good deal of it, small craft, and we have to have a base to tie that up when it is not actually dredging, and so I had looked over, you might say, most of the San Diego Bay area to find a suitable place for tying up the equipment and, frankly, I didn't find anything that was very suitable, either as to extent or protection. [298]

Q. What do you mean by "extent"?

A. Well, you have to have a lot of water front and a lot of beach line in order to tie up quantities of equipment that are entailed in a dredging process, such as—you see, there is practically 1,000 feet, 1,000 feet or more, of water frontage in there.

Q. Referring to the line where the green meets the blue?

A. Yes.

Q. What do you refer to by "protection"?

A. Well, it gets pretty rough in San Diego Bay at certain times, particularly when they get wind from the southeast, or any southern flurry, for that matter, so we wanted to get a place where the equipment would be protected from the sea and the chop and the wind at such times, and that was the reason for staying on the inside

(Testimony of Barrett G. Hindes)

of the elbow there rather than going out around the outer end.

Q. In considering and in negotiating this lease, did you have occasion to consider the terms of other leases that were granted to the tenants along the harbor front of San Diego, the rental, what the restrictions were, their activities, and so forth?

A. I inquired in a general way, enough to know that—

Q. Well, don't tell us what you knew. You did inquire? [299]

A. Yes, I did inquire.

Q. Taking into consideration these matters of physical location and the other matters which you have already testified to, and considering the terms of the lease actually entered into, did you have an opinion as to the value of that leasehold right on November 10, 1942?

Mr. Landrum: Could I ask whether or not that includes all structures on it, too, or is it just the leasehold alone?

Mr. Sloane: The leasehold as it stood, with the improvements and structures on November 10, 1942.

Mr. Landrum: All right.

Q. By Mr. Sloane: Will you give us your opinion as to the value on that date?

A. I would value it, taking into consideration the various factors which have been mentioned, plus the terms of the lease and the fact that there was 18 years of the lease to run yet, at about \$120,000.

Q. Do you have a copy of the lease in your hand?

A. Yes.

(Testimony of Barrett G. Hindes)

Q. Will you mention to the jury the features of that lease which gave it added value, in your opinion?

A. Well, as I was one of the main ones in drawing up this lease, why, I think most of these points are good. To start with, in parcel 7 we have a long water frontage without excessive depth. It is about 200 feet of land in [301] depth there, which affords ample space for storage or for warehouse buildings or terminal facilities, such as if you wanted to build docks in there, transit sheds, railroad to serve them, I feel that long water frontage with medium depth is to great advantage.

Then with regard to the water area, the other portion in connection with it, that 500 feet of width is a sheltered basin where equipment or fishing boats, or boats under repair, or dredges, or barges, or other such equipment, can be moored safely throughout the year and can be properly tended, and with access to shore, and all that. Then with that water extending out there, it gives access to the deep water outside.

There is one point in this that has already been mentioned, that the main channel of 30 feet extends down opposite this property, just 1,000 feet away. This lease very carefully stated that the Bridge Company could sub-lease 50 per cent of this area, practically without restriction. That meant that that property was available for development as deep water shipping facilities, as a lumber transfer facility, as oil docks, and any one of the major uses of waterfront property. I believe that clause is something that I haven't seen in any other lease in this area.

(Testimony of Barrett G. Hindes)

Q. What with regard to assignment of the lease?

A. That is what I am referring to, that it may be sub-[301] let or assigned, providing—well, about the only thing that can't be done out there is to commit a nuisance, to have tanneries or the smelting of metals or reduction of garbage or refuse, or any other matter constituting a nuisance, which leaves us pretty broad opportunities for using the land.

Q. Are there any other favorable points that come to your mind?

A. Also, that the lease could not be broken unless there was an actual violation of the terms thereof. In other words, the City did not reserve the right to cancel the lease on any given number of days, either to sell the property, or to give it somebody else, or like that. Another distinct advantage was that the railroad touched the corner of the property; that there were easements; that the City would maintain the street out there, that we had police and fire protection, even though it was somewhat outside of the center of the City. So I considered that the lease was particularly advantageous; in fact, very much more so than the average lease that a person could obtain, say, today or at any time when they have got something to sell or something to lease.

Q. How about the right to remove buildings at the end of the lease?

A. Yes, that right was reserved to the tenant, to move [302] any improvements.

Q. How about taxes?

A. The taxes merely went against the improvements; I mean against physical improvements, and the personal

(Testimony of Barrett G. Hindes)

property taxes, of course, on the equipment which existed there within the city limits.

Q. It provides there shall be no tax except on personal property? A. Yes.

Q. What with regard to exclusive use of the water area?

A. That was granted us by the City through whatever ordinances and rights that they have, in a very similar manner to what, say, the City of San Diego here grants, policing, and individual use of waters in front of certain properties, such as in a boat yard, where it is necessary as a part of the business to tie boats up out near the ways in the water, so that other people can't come and get them all gummed up.

Q. Is it feasible, or was it in 1942 feasible to dredge to a deeper depth than the 10 feet that you left it in?

A. Oh, yes.

Q. Have you an estimate as to the cost, as an expenditure, at that time and since to deepen it, say, to 30 feet within the area? [303]

Mr. Landrum: That is objected to, if the court please, as incompetent, irrelevant and immaterial. We are concerned with the date of taking, and not something they might have conceived to do after that date.

The Court: The objection is sustained.

Mr. Sloane: You may examine.

The Court: I think we will take our recess now, ladies and gentlemen. Remember the admonition and keep its terms inviolate. Occupy the jury room.

(A short recess was taken.) [304]

The Court: All present. Proceed with the cross examination.

(Testimony of Barrett G. Hindes)

Mr. Sloane: I have two more questions, your Honor.

The Court: Very well.

Q. By Mr. Sloane: With regard to the pier which was constructed, can you give us an estimate as to the life of that kind of a structure the way it was made?

A. Yes. The piling as driven in there was actually driven with concrete shells poured around them to keep the marine borers and other deteriorating things away from them. And the piling, of course, was the main basis of the structure. With reasonable maintenance of the stringers and the decking, I would say that pier had a life of 25 or 30 years. In other words, it was well adequate for our lease and that would have an appreciable residual value.

Q. With regard to the rental payments called for in your lease, which I believe was \$10 during the first 10 years and \$50 a month during the second 10 years—

A. Yes, sir.

Q. I will ask you whether or not you have kept the rentals paid called for in the lease.

A. We have.

Mr. Sloane: That is all.

Cross Examination

Q. By Mr. Landrum: Mr. Hindes, will you come with me [305] just a moment down here to the easel here and discuss with me Defendant's Exhibit N? I notice on this Exhibit N certain lines, with a figure on them, for instance, the one to which I am pointing here being a dashed line, with the figure "10" inserted in it. What does that mean?

A. Those lines are what are called contour lines and in a ground surface which is not exactly level this par-

(Testimony of Barrett G. Hindes)

ticular line you referred to indicates that all points exactly on that line are 10 feet.

Q. Now, to develop that for just a moment, what you mean is that that is a line, which we call a contour line, which shows the depth of the water at that place?

A. That is correct.

Q. In other words, that is a contour laid on the bottom?

A. That is correct.

Q. Can you tell me why that particular one is dashed? Is that because they didn't have an accurate sounding and that was projected? I notice some of them are solid.

A. It is for convenience and recognition. You will notice that the "10" and the "5" are both dotted and out in here the "30," "25," "20" and "15" are dotted. In other words, all contours of even 5 feet are dotted in order to make them more easily recognizable.

Q. What I am getting at is this, that that is where the [306] engineers, for example, had taken it at a certain point?

A. Yes, sir.

Q. And that is one where you have definite data?

A. Yes, sir.

Q. But that doesn't mean that they took a shot sufficiently close together that they didn't have to project some of this, does it?

A. Not exactly. In sounding, in the normal procedure of sounding for soundings, they sound at certain intervals all the way along there, dropping a lead line and determining in that way the depth below mean lower low water, and they take a series of those soundings and from those soundings—may I suggest—

The Court: Keep your voice up, please.

(Testimony of Barrett G. Hindes)

The Witness: May I suggest that there was an exhibit presented, I believe, which shows this area, with the actual soundings on it, the individual soundings from which these contours were made.

Q. By Mr. Landrum: In other words, this one we have here, that shows those little figures we were talking about the other day? A. Yes.

Q. If you find "10 feet" here and the figure "10" here and the figure "10" here, the engineer will simply draw a line between those tens as best he can and that makes the continuous [307] contour? A. That is correct.

Q. In this map here which is in evidence as Defendant's Exhibit N, we have the actual condition of this land in so far as its elevation above sea level and in so far as its being covered by water as of the date this was made, don't we? A. That is correct.

Q. I notice that up here to where I am pointing on this side, the figures are "5," "0," "Plus 1," "Plus 2." What does that mean?

A. That indicates that the shore is on a slope running from approximately 10 feet at the bulkhead line on a slope up to plus 10 or 12, shoreward of it, from which point the land easterly is all high dry ground.

Q. For instance, if I am correct and, if I am not, please correct me, this exhibit shows that at the point to which I am now pointing that contour is under 5 feet of water, doesn't it? A. That is correct.

Q. And then at this point to which I am now pointing it shows this is zero and that is just at the water level?

A. That is right.

Q. And that at this point it is one foot?

A. Yes.

(Testimony of Barrett G. Hindes)

Q. Can you give some indication from this map, from [308] your experience as an engineer, as to just what that slope would be? In other words, there is one foot slope between this contour line and that one. How far would that be actually out on the ground, if you can tell?

A. Yes; I can tell. Between what elevations?

Q. Where there is a change of one foot; for instance, between the contour line marked "Plus 1" and the contour line marked "Plus 2." How far would you travel on that land from where it is one foot to where it is two feet?

A. About three to four feet.

Q. Do you mean that within three to four feet on that ground right there there was a rise of a foot?

A. I do.

Q. That is a slope, then, of about 1 to 4?

A. That is correct. This drawing is made to a scale of 1 inch to 40 feet. There is approximately 1 inch or somewhere there. So you get from zero up to say 10 feet, which would give you an average of 1 to 4.

Q. Let's develop that a little distance further. What you are saying is that to get a rise of 10 feet—how far do you travel and how many feet is it where the land rises up 10 feet?

A. Approximately 40 feet.

Q. Then, it is fair to say it is 10 feet higher 40 feet back? [309]

A. That is correct.

Q. That is shown right on your exhibit?

A. That is correct.

Q. Now, tell us again just when that situation existed there.

A. Do you mean when these soundings were made?

(Testimony of Barrett G. Hindes)

Q. Yes. I would like to know.

A. These soundings were taken from a drawing made by the Maritime Commission from their soundings, soundings prepared on January 23, 1942, and I compared this drawing with the Maritime Commission drawing.

Q. So, by taking that exhibit, we can visualize the character of this land in so far as its being level or sloping is concerned, can we not?

A. That particular portion of it, which is the water frontage, which is a normal water frontage.

Q. There is another matter that I wish you to discuss with us, please, Mr. Hindes, and that is this question of bulkhead line. I have heard that discussed. Now, what is a bulkhead line? Who establishes it?

A. A bulkhead line is a line ordinarily established by the Army Engineers, usually as a result of public hearings in the local area, and there are usually two lines established at the same time, the bulkhead line and the pier head line. The bulkhead line is supposed to be the limit, that is, the [310] major shore line, the major dry land line. And in between that major shore line and the pier head line is ordinarily the channel line, under permit from the United States Engineers. You can get permits to build either open type wharves or solid wharves or, in other words, structures to serve navigational interests.

Q. Am I correct—this is a little leading, your Honor—am I correct, then, in saying that the question of where that bulkhead line is to be located is a question for determination by the Army Engineers of the United States? Is that right?

A. Yes.

Q. I understood you to say something just now with relation to the control that the United States Army En-

(Testimony of Barrett G. Hindes)

gineers have over the use which may be made of lands similar to these, did I not? A. No; not use.

Q. I notice in this exhibit here which you have, which is marked Defendant's Exhibit N, there is a clause, "It is further understood and agreed that all of said filling and dredging are subject to the permission and approval of the United States Engineering Department, and all undertakings on the part of the company herein contained shall be subject to such permission and approval, but, if the United States Engineers Department refuses to give its permission and ap-[311] proval of the dredging and filling hereinabove described, this agreement is to be null and void and of no force and effect, as will be the lease which is based upon this agreement."

A. That is correct.

Q. Now, will you discuss with us just what it is that the Army Engineers have control of and which you protected against in that exhibit?

A. They have control of the changing of the navigable water areas by dredging or by projecting piers or moles or breakwaters or other structures out beyond the bulkhead line.

Q. Is this not true, that, in order to put in any structures out beyond the bulkhead line, you have to secure the permission of the Army Engineers of the United States? A. That is correct.

Q. And, if you do not get that permission, you cannot construct whatever it is you want to construct there, can you? A. That is correct.

Q. Now, are those permits perpetual and forever or may they be revoked or changed by the Engineers?

A. My understanding is that they are perpetual.

(Testimony of Barrett G. Hindes)

Q. I take it this permit business is due to the fact that the Army Engineers control this in the interest of navigation? A. That is the basis of it. [312]

Q. That also is true not only here but it is true also in Chula Vista, isn't it?

A. And in San Francisco and New York and everywhere else in this country.

Q. Now, let me ask you this. Are you familiar with the lands on down south of this particular location?

A. I have been down there.

Q. Tell me, then, if you know, whether or not the United States Army Engineers as to this land which lies south of here have as yet established a bulkhead line.

A. I cannot tell you that.

Q. Will you tell me this, whether or not there was, on the 10th day of November, 1942, a parcel of land, of approximately 30 acres, which adjoins this on the south, which was available for rent or lease?

A. Can I tell you if it was available?

Q. Yes.

A. There was an area south but there wasn't much land there.

Q. What was it? A. It was mud flats.

Q. This was mud flats, too, wasn't it?

A. What date are you talking about?

Q. The date before you fixed this up, which were [313] mud flats. A. Yes; that is correct.

Q. What I am trying to get at is there isn't any imaginary chop off here? There is nothing south of this that could be dredged and fixed up like you fixed this line? A. No; I don't believe there is.

(Testimony of Barrett G. Hindes)

Q. As a matter of fact, you are familiar with this channel out here, which I believe you said that you constructed for the government? A. That is correct.

Q. Does that channel extend on down further south or not? What is the situation?

A. At the present time, it stops right at the end of this Area A, I guess you would call it.

Q. Isn't there some channel 20 or 25 feet deep that goes on down?

A. There is some natural, medium depth of water.

Q. Tell us about that. What do you mean? Does it run 20 feet or anything like that?

A. I believe it is indicated on the chart.

Q. Will you be good enough to come down here, please?

A. There is an irregular area in which the depths are natural and irregular. At some points they were 13 feet, some points 15 feet, some points 18 and some points 16, in this area immediate adjacent to the south, that counsel is talking about. [314]

Q. How deep did you dredge this parcel which you say you dredged? How deep did you dredge it to?

A. We dredged it to a minimum of 10 feet.

Q. And then down here in the water, to which you just pointed? A. The water is deeper there.

Q. Without dredging, is that right?

A. Irregularly deeper.

Q. I believe you pointed out to us some of the advantages of your particular lease. You said something with relation to your right to sublease?

A. Correct.

(Testimony of Barrett G. Hindes)

Q. You had that clause in your lease?

A. Yes, sir.

Q. Why do you say that the right to sublease makes that lease more valuable?

A. Because the land has potentialities and the area has potentialities of development for certain deep water interests, which give it a higher value.

Q. In arriving at your conclusion with relation to the fair market value of this leasehold interest, did you take into consideration the fact that the lease contained a provision that you might sublease 50 per cent of it?

A. I took into consideration the lease as a whole and that might have a minor effect, among other things. [315]

Q. When you use the word "minor" do you mean it would have a minor effect or a major effect?

A. In this lease there are many advantageous points. I would not say that you could just pick one clause out and say that is the secret of the lease because they all have a bearing.

Q. By your answer with relation to the fair market value of that land, did you mean what your lease could have been sold for on the open market, for cash?

A. I was referring to what it was worth to us and I conceive that it would be worth at least that much, if not more, in the open market, as to its market value or as a sublease.

Q. If it didn't have a sublease clause permitting you to sublease it, it wouldn't be worth anything in the open market, would it?

A. That would restrict it to the value which I would put on it for my own uses.

(Testimony of Barrett G. Hindes)

Q. So, if the clause to which we are referring were not within that lease, you couldn't get anything for it on the open market, is that right?

A. Oh, naturally, if you can't sublease it; if it says you can't sublease it.

Q. And then the value for that purpose goes out the window, is that correct? [316]

A. It would.

Q. Will you just give me another one of your factors there that you said you took into consideration in arriving at your conclusion with relation to the market value in addition to your right to sublease? What were the other peculiar features of this lease?

A. It was non-cancellable except on violation of the terms of it.

Q. When you say that it was non-cancellable, do you mean that the City of National City could not, for any reason of its own, say, "Mr. San Francisco Bridge Company, we desire to terminate your lease"; that they couldn't do that?

A. I don't think they could. I think they could say it but it takes a better lawyer than I am, shall I say, to know whether it would do them any good to talk.

Q. What I am getting at, Mr. Hindes, is this. If that lease contained a clause which provided—if the City of National City wished to cancel that lease because it proposed to use the land for its own purposes, would you think it would have any value then to you or anyone else?

A. Do you mean would the lease have any value to me?

Q. Yes; if it had that clause in it.

A. It would have appreciably less value.

(Testimony of Barrett G. Hindes)

Q. As a matter of fact, you would never have signed any [317] such lease as that, Mr. Hindes, would you?

A. I don't believe I would.

Q. Do you have any records or are you able to tell us how long it took you to do this dredging to which you have referred?

A. Do you mean in that particular basin there?

Q. Yes, sir. I understood you to say that the dredging cost you or that you invested in the dredging a certain amount of money. Now, I want you to tell us how long it took you to do it.

A. I said the dredging in that area had a fair market value of that amount.

Q. How long did it take you to dredge it for what you set at a fair market value of that amount of money?

A. It was dredged in the month of February, 1941.

Q. How many days?

A. I don't recollect. I have computed the quantities.

Q. Tell us the number of cubic yards of dirt that you moved in doing that dredging.

A. Approximately one hundred sixty-three thousand odd.

Q. One hundred sixty-three thousand odd?

A. Yes, sir.

Q. You were engaged in the dredging business at that time, weren't you? A. That is right. [318]

Q. As a matter of fact, you were doing dredging for the government of the United States at about that time?

A. That is correct.

(Testimony of Barrett G. Hindes)

Q. What was the going price per cubic yard for dredging such as you did there, as of that time?

A. 32 to 39 cents per cubic yard.

Q. Take 40 cents and move the number of cubic yards that you say you moved and then what would have been the cost of that dredging?

A. Well, that would be 40 times 163. To be perfectly frank, I multiplied it by 35 cents.

Q. All right. Take that figure. What does it come to?

A. \$57,315.

Q. Now, I am going to ask you if it is not a fact that you had a contract about that time, to do a job for the government, at a figure of 10.3 per cubic yard.

A. That is correct.

Q. Why do you say that 35 cents, then, would be proper on this one?

A. Because one job was a 6,000,000-yard job. And due to mobilization of plant and various other factors entering into it, one price is applicable to one type of work and another to another. And I make the statement that 35 cents is a fair figure due to the fact that there were two jobs in [319] identically the same area, one job of, I believe, 158,000 yards, which went for 32 cents, which was dredged in the same area right there, and another one, a little bit smaller, adjacent to that, in between the two moles, for 39 cents.

(Testimony of Barrett G. Hindes)

Q. Did you do those other jobs?

A. No, sir; we did not.

Q. When a man has got a job to do and particularly in this dredging business, and gets his dredge down there set in that locality, he can do it a lot cheaper than if he had to move it in, can't he? A. That is correct.

Q. You have discussed with us this business of mean low tide, have you not?

A. I mentioned it. I merely mentioned it.

Q. Tell us what that means. What do they mean when they talk about mean low tide?

A. The expression, if I may correct you, is mean lower low water. Each day there are four tides. There are two low tides and two high tides. Of the two low tides there is a high low tide and a low low tide. By taking the average of the low low tides throughout a great many years, the United States Engineers have determined a figure, or I mean a point. It is the base from which most or all dredging that I know of is done from and the base from which most wharf elevations are set from. It is a mechanical computation of [320] these actual tidal readings.

Q. It is what they say is the average? For instance, they take the low low tide and the high low tide and they add the two of them together?

A. No. They just average the low low tides. It is just what the word says, meaning lower low water.

(Testimony of Barrett G. Hindes)

Q. I think you said there were four.

A. That is right.

Q. They only take the high low and the low low?

A. No; they only take the low low.

Q. Now, that has nothing whatsoever to do, though with the average high, does it?

A. No. It is the point from which you measure the average high.

Q. But that doesn't mean that that is the average or the way the tide comes inland, does it? A. No.

Q. In other words, they took an average of the lows, the middle of the lows? A. Yes, sir.

Q. They didn't take the high tide into consideration at all? A. That is right.

Q. In other words, when we talk about mean low tide, that doesn't mean that the water doesn't sometimes get many [321] feet above that?

A. And goes somewhat below it.

Mr. Landrum: I think that is all.

Mr. Sloane: You may be excused.

Mr. John M. Martin: If the court please, may I ask the witness one question at this time?

The Court: No; I think not. The record may show that John M. Martin, representing the Tavares Construction Company, asked that question.

Mr. Sloane: We will call Mr. Joseph Brennan.

JOSEPH W. BRENNAN

called as a witness by and on behalf of the defendant San Francisco Bridge Company, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Joseph W. Brennan.

Direct Examination

By Mr. Sloane:

Q. State your full name. A. Joe Brennan.

Q. Do you live in San Diego? A. Yes, sir.

Q. For how long? A. 55 years.

Q. Do you have an official position here? [322]

A. Yes, sir.

Q. What is it?

A. Port Director of the City of San Diego.

Q. For how long have you been such Port Director?

A. 29 years.

Q. Will you tell us in a general way what the scope of your duties is and has been during those years?

A. Yes, sir. It is the control and operation of the Harbor Department of the City of San Diego, entering into tideland leases for buildings, piers, docks, drainage, sewers and whatnot.

Q. Prior to that, did you have some navigation experience?

A. Yes, sir. I was with the Spreckels Towboat Company for about 10 or 15 years.

Q. What were your activities as of November 10, 1942? A. Down to the Harbor; Port Director.

Q. Did your duties on that date cause you to be acquainted with the water front of the Harbor of San Diego, with particular reference to the easterly shoreline? A. Yes, sir.

(Testimony of Joseph W. Brennan)

Q. What dealings did you have with leaseholds and tenants on or before that period?

A. Well, our office handles all tideland leases. We have some 75 or a hundred leases and we have to negotiate [323] the terms and conditions of the leases.

Q. When you say "we have to," who do you mean?

A. Our office.

Q. Do you take any part in that yourself?

A. Yes, sir; I am it. In other words, I am the goat.

Q. You are familiar, then, with the leases that are now outstanding and were outstanding in November, 1942?

A. Yes, sir.

Q. Can you indicate on this chart Exhibit K about the range of territory that is covered by the city tideland leases?

A. Yes, sir; from here down to about here. In other words, we go from the government reservation clear on around down to the government reservation line at 28th Street.

Q. Does the City of San Diego have any control south of 28th Street?

A. No, sir.

Q. Under what is that adjacent control?

A. Some of it is the Destroyer Base and then National City and Chula Vista.

Q. With reference to the National City and Chula Vista areas, can you tell us what was the condition of the deep water channel in 1942, in November?

A. Well, it shows on that chart a 30-foot depth down [324] to just below the area that is called the Destroyer Base.

(Testimony of Joseph W. Brennan)

Q. Going a little further south on the channel, is there any useable land, to your knowledge, south of the point of the subject land we are talking about here?

A. There wasn't at that time; no, sir.

Q. In other words, the tidelands have to be filled in to be useable?

A. The only area that was filled in was the little piece of project in about the "Y" at National City, outside of government-owned property.

Q. What land did the City of San Diego have available for use at that time, in November, 1942?

A. We had about 50 acres, I think, all told, out of our area, which wasn't under lease.

Q. What portion of the San Diego City tidelands are devoted to commercial-industrial uses?

A. Well, generally, it is considered from about Fifth Street on down to the government line.

Q. To what extent was that occupied in 1942?

A. We had about, I guess, possibly 40 or 50 acres that wasn't under lease at that time.

Q. Was that devoted to any purpose and dedicated to any purpose particularly?

A. Chiefly, cannery and boat works and allied industries that have to do with the fishing industry, like oil [325] docks.

Q. Do I understand that that is the use to which those lands were being put in 1942?

A. Yes, sir; those that were occupied.

Q. What portion was not occupied?

A. Here is the foot of 28th Street. There was a little area in here, about 16 acres on that side and about 20 acres in here, that wasn't leased yet. This area is

(Testimony of Joseph W. Brennan)

what is called the fish cannery area, and this area was to be a boat basin or whatnot, and the canners were to go into this area, and then the Federal Housing came along and took all of this land in about 1942, I think, or 1941, and made a housing project out of it. And then, when they got off, the canneries and the National Iron and Shipyards and one thing and another took it up and built on it.

Q. When did the government get off?

A. I think around 1945, or I think the Navy held onto its piece until 1946.

Q. In your opinion, is there any distinction to be drawn between the value of use of the tidelands in the subject area and the value of the use of tidelands say at the foot of 28th Street and that vicinity, assuming that the development is of the same degree on the parcels in both locations?

A. I think not. I don't see why it should if it is all tideland. They don't go on the tidelands unless they want [326] the water frontage as a rule. And it would seem in this area anywhere they should have the same value. That is the way I tried to look at it.

Q. In your opinion, what was the value, the rental value, of tidelands in the southerly portion of the San Diego limits and the tideland opposite the City of National City in November, 1942?

A. I wouldn't be qualified on this one down here but I know what ours is. We get—

Mr. Landrum: Just a moment, if the court please. That is objected to upon the ground and for the reason that the witness has admitted that he is not qualified down in the City of National City.

(Testimony of Joseph W. Brennan)

The Court: He stated previously that he couldn't see any differentiation between them, assuming that the conditions were similar. I think it is a question as to the weight of his evidence, not as to its admissibility. He may answer.

Mr. Landrum: All right.

The Court: The objection is overruled. If you have finished with the map, you might resume your seat. Do you want to use the map any more with the witness?

Q. By Mr. Sloane: You might indicate where the city boundary lines are.

A. That is our limit right there when you cross over this dry creek here. You then get into the government prop-[327] erty and our property goes from here on around to the government line over here. And along in this property in here we get so much per year per square foot. That is the value we put on our leases and it is more or less reflected—

Q. Will you take your seat?

The Court: Now we will have that question read to which the objection was overruled.

(Question read by reporter.) [328]

The Witness: Shall I answer that?

The Court: Yes.

The Witness: Well, as I said before, my interests are in San Diego and I know definitely what they were, because I know what we got for them, see, but when it comes to National City, if I were running the show for National City, I know I would get as much as we got or more than we got in San Diego, because in San Diego we have no more room. But I don't know what they did down there. I don't know how they run it. I know we

(Testimony of Joseph W. Brennan)

get all we can, but we do have a standard to which we do not go below.

The Court: What was that? That was the question you were asked.

The Witness: That starts in at three cents a square foot and is progressive.

Mr. Landrum: Just a moment. If the court please, I am going to object on the ground and for the reason that he is stating present-day values, present-day rentals. We are concerned here with a date in 1942.

The Witness: I didn't exactly say that, Mister, because our records show—

The Court: Just a moment. We are trying to get a record here, and I am responsible for it. I think you ought to give it as to the date of the taking. That is the pertinent question here, not at some other period. [329]

Q. By Mr. Sloane: Referring to November 10, 1942, Mr. Brennan, can you give it to us back that far?

A. Yes, sir. We have many leases on that date, at three, four, five, six and seven cents.

Q. Now, when you spoke of a progressive rate, how is that calculated?

A. Every five years there is an increase of one cent.

Q. That is, taking the first five years, it will run the first five years at three cents, then five years at four cents, and so on?

A. Yes, sir.

Q. I will ask you to examine the tideland lease which is in evidence here, marked Exhibit L. I believe you have seen that before, have you not?

A. Yes, sir.

Q. Will you state how that compares, how the rights granted under that lease to the occupant compare with rights granted to occupants under your leases with refer-

(Testimony of Joseph W. Brennan)

ence, first, to assignability? What does your standard lease provide as to assignability or subletting?

A. Our tideland leases provide in San Diego they cannot be assigned or transferred without the permission of the Harbor Commission.

Q. With regard to cancellation, what provision do you have in your leases? [330]

A. Well, cancellation for not complying with the terms and conditions of the lease, and then they also reserve the right to change, annul or modify leases.

Q. Without any restriction as to why you do it?

A. Yes.

Q. Do you make any differentiation in the rate of the rental on account of the use to which the property is to be placed by the lessee?

A. Well, yes. For instance, an oil station like on Pacific Avenue that employs two or three people, they generally start out at seven or eight or ten cents, on us. They run a little higher on that type of lease. If you have a large industry like, well, say, the Consolidated, for example, who during the period of the war paid six or seven hundred thousand dollars in taxes, we take that into consideration in setting our rental, considering that the taxes go into the City coffers, and it is equivalent to a rental. Then another industry like a cannery, which is one of the few industries that can operate successfully in San Diego, we give them consideration. They also have a large pay roll and pay considerable taxes. They take a larger—I mean, they run a lighter rate than like a restaurant or a filling station, or some little thing like that.

(Testimony of Joseph W. Brennan)

Q. The rate that you spoke of, is that what you classify as a smaller rate or larger rate, or what? [331]

A. Which rate?

Q. The three, four or five cents.

A. That is our average for industries now, yes, sir.

Q. As of 1942? A. Oh, this in 1942?

Q. Yes.

A. We had some of them then, yes. Twenty-five years ago we had to go out and look for tenants. Today we can't find a place to put them.

Q. What is the customary period of leasing by the City?

A. We can lease up to 50 years. Ordinarily they try to get by, if it is a pretty good investment, on 25-year periods, and small investments on—do you want to save that thing there?

Q. Yes, we may want to use it later.

A. —the smaller leases, with smaller investments, we try to get by with 5 or 10 years.

Q. What I am trying to get at is as to the progressive rate of three, four and five cents? Did it go on indefinitely?

A. No, to 25 years. Then at the end of the 25 years, they have an adjustment, setting a rate for a further 25 years if the lessee takes up the option.

Mr. Sloane: You may examine. [332]

By Mr. Landrum:

Q. What did you mean when you said they try to get by on a 25-year lease?

A. Well, we feel unless you have a big investment that 25 years is a long period, and we don't like to tie the lands up for longer periods than that, if we can help

(Testimony of Joseph W. Brennan)

it. Naturally, a lessee wants to get 100 years, if he can, but these are public lands and we are answerable to the taxpayers, and what not, and we try to keep the City's interests in mind as best we can. If we have a good tenant and the lease goes 25 years, at the end of the 25 years he has no trouble getting an additional 25 years.

Q. I thought what you meant was to say some didn't want to go as long as 25 years. A. Oh, no.

Q. They want more? A. Yes, sir.

Q. Of course, the longer period they can get, if they are substantial people, the better it is for them; that is right, isn't it? A. Yes, sir.

Q. And that is also better for the City of San Diego, I take it? A. Yes, sir. [333]

Q. Now, do you know, Mr. Brennan, what was the going price or what were they actually getting for these leases on November, 1942, down in the City of National City for this land with which we are here concerned?

A. What National City was getting?

Q. Yes. A. No, sir.

Q. Do you feel that the rate of rental which was being received in the City of San Diego would be a proper measure to determine the income which was being received by the City of National City for these lands?

A. Do I understand you to mean, do I think that National City should get the same rate we got?

Q. Yes.

A. Why, I wouldn't see any reason why they shouldn't.

Q. Well, do you know what they were getting?

A. I do not.

(Testimony of Joseph W. Brennan)

Q. All right. Now, I believe you said that in arriving at your figure upon which you would enter into a lease with a private individual or corporation, you took into consideration what benefit that corporation or individual might actually give to the City of San Diego, in addition to the rental, didn't you?

A. That is one of the determining factors, yes, sir.

Q. That is right. You, as a representative of the [334] City of San Diego, have gotten the best price you could get?

A. That is right.

Q. By taking into consideration the advantages which this particular corporation would bring, on account of its pay roll, and things of that kind?

A. That is correct.

Q. In other words, you have taken an overall picture?

A. Yes, sir.

Q. Did you have any leases here which extended back with the back land as far as 1,000 or 1,500 feet away from the bulkhead line, for which you received the rental that you have given us?

Mr. Sloane: Your Honor, may I interpose an objection on the ground that is not proper cross examination? This witness has confined his testimony to parcel 7, which goes back 200 feet or so.

Mr. Landrum: That is correct, your Honor. I withdraw the question.

Q. By Mr. Landrum: I will ask you, did you, in arriving at your figures there with relation to the rental, take into consideration, or did it make any difference

(Testimony of Joseph W. Brennan)

about how far back from the bulkhead line the property was in what you would get for it?

A. Well, I would say it didn't make a heck of a lot difference because, as I said before, if a fellow goes down [335] to the water front, he goes down to the water front because he wants water frontage, and so forth. Take the National Iron. They extend back a considerable distance because they require it in their activity. But taking the Marine ways, they only have to go back, say, 200 feet. In our case we haven't any land, or I should say only a small acreage that runs back beyond a short distance, and mostly that is down on Lindbergh Field, but all property there is water-front property and carries practically the same value, as we see it.

Q. What I am trying to get at is this: just tell us how far back does your property run? How far back is the back land in San Diego that you are talking about?

A. Well, starting in at the foot of Eighth Street, it is about four or five hundred feet. Then it goes down to about Benson, where it is 200 feet. At National Iron it is 1500. It zig-zags in and out according to the mean high tide line, but that is available for that purpose, and practically all of our people, as I said, are on the water frontage.

Q. Now, Mr. Brennan, what makes this land, this tideland that we are discussing? You can make it out of any land that is on the water, if you fill it in or dredge it out, can't you?

A. Well, getting back to Barrett Hinds' testimony about your pier and bulkhead, the United States Engineers [336] take the tidal prism of the water, and they specify a bulkhead line and pierhead line, and if you go

(Testimony of Joseph W. Brennan)

beyond the bulkhead line, you must get a War Department permission, which grants you that permission, and which the City got when they built the B Street pier. When you get to dredging, that makes your valuable land. It is the same as down there, and if you don't dredge, you don't get the deep water.

Q. But the difference is as to how much money you are going to put in in making that dredging?

A. How much money?

Q. How much money are you going to put in in reclaiming those lands.

A. Yes. Some parts dredge easier than others and some are tougher.

Q. And that situation is also true down south of National City, if they went in there and spent enough money?

A. Oh, yes. Yes, sir, you can make land if you have got money enough to make it.

Q. And when you make it, you get water next to it, then, don't you? A. If you use your head, yes.

Q. And if you don't use your head, you lose your money? A. Yes, sir.

Q. Now, there is just one further question I want to clear up, please, Mr. Brennan, and that is, I want you to [337] tell us definitely if you know how many acres, or what area here in San Diego was available for lease, and available on the 10th day of November, 1942? I believe you gave us that figure, but I want to get it as definite as I can.

A. Well, I wouldn't attempt to give you within a few pieces, as to what we had. I did check it over because this was one of the questions they said they might ask,

(Testimony of Joseph W. Brennan)

and I did go through the records, and I found we had around 50 acres around that time. That included practically every little piece. We had stretches here, there and yonder, but the only amount of any acreage in any one piece was, as I said before, the piece the Federal Housing took near the foot of 28th Street. The rest were in small acreages. Some were held up for cannery purposes, and what not, but we had at that time about that many acres.

Q. So, as I understand you, you made a particular study to come in and give us that figure in this case?

A. I didn't. I told you I wasn't going to come in here and get caught, and not know what I was doing. I do not carry all those figures in my head.

Q. All I asked you was this, Mr. Brennan: You really did go and make a particular investigation to get it right and to come in and tell us?

A. I said approximate. I am saying that if you want the records, I can get them. But I am not going out and [338] tell you exactly, or these people, that I had exactly this much or that much, but I do know we had a limited amount, and I do know that more or less a lot of it was taken up, and in 1942 we practically got rid of everything we had. We had nothing from then on until they released something in 1946.

Q. Can you help me a little bit more? About when was it in 1942 you got rid of practically everything you had? A. Early in 1946—

Q. In 1942?

A. Early in 1942, right after Pearl Harbor the Navy took over the big areas we had down there and left us nothing to lease.

(Testimony of Joseph W. Brennan)

Q. But before Pearl Harbor you had lots more?

A. I didn't say lots more.

Q. Well, you had some more?

A. Yes, I had some more.

Mr. Landrum: All right. That is all.

Mr. Sloane: Unless other counsel want to question Mr. Brennan, or the court, that is all.

The Court: I guess that is all.

(Witness excused.)

The Court: Ladies and gentlemen, we will take a recess until 2:00 o'clock this afternoon. Remember the admonition and keep its terms inviolate. [339]

(Thereupon the jury was excused, and the following proceedings were had outside the presence and hearing of the jury:)

The Court: The record will show that these proceedings are at the bench, in the absence of the jury, government counsel being present and counsel for the Tavares interests being present.

Now, Mr. Martin, will you state again what you did before when the reporter was not here?

Mr. John M. Martin: I desired, your Honor please, to bring into the court room immediately preceding the commencement of my clients' testimony certain models and maps that I have had prepared, for the purpose of showing the claim of my client. I have specifically requested permission so to do because there has heretofore been presented to the same witness certain questions with which I am not concerned.

The Court: What is the attitude of government counsel?

Mr. Landrum: There is no objection whatsoever to just bringing them into the court room. I do not think they should be displayed to the jury, however, until they are received in evidence.

The Court: That is right. They will not be so displayed. There is one further matter I would suggest to both of you. I think in the opening statements, particularly on behalf of the Tavares interests that there should be some [340] clarification of that because the pleadings and the proceedings thus far haven't given to the jury, and I am afraid the jury will not be able to sense or appreciate just what the Tavares interests' claims are and what the government contends with respect to them.

Mr. John M. Martin: Do you want to make an opening statement on that?

Mr. Landrum: Now, if your Honor please, in that connection, in view of the situation which has gone forward with relation to the landowners' claims, the government feels that it should, with the court's permission, defer its opening until the government starts with its case. If, however, your Honor feels it might clarify the situation, I would have to make an opening as to all our case, both the landowners and as to Tavares. If I make any, I feel I should, but I would like to defer the government's opening. I would have to make it as to all of them, I suppose, if I am going to make it before the Tavares case.

The Court: There is a vast difference between the issues that are created under the pleadings and under Judge Yankwich's ruling as to the Tavares interests and as to the others.

Mr. Landrum: That is right.

The Court: The latter are simplified as compared with the issue that is presented under the record as to Tavares [341] and its auxiliary and companionate activities.

It was the court's intention at the outset, and I think it is still the proper method, providing the opening statement as far as Tavares is concerned is confined to evidential, probative matters,—

Mr. John M. Martin: It certainly would be.

The Court:—and does not merge into any argument on deductive matters—

Mr. John M. Martin: Oh, no.

The Court: —I think that if that is the case, the government at the commencement of its case, its responsive case, should cover the entire field—

Mr. Landrum: Yes, sir.

The Court: —with specification, however, as to the intricacies, because there are some in the Tavares issue that do not exist, in my judgment, at all in the other issues.

Mr. Landrum: That is right.

The Court: The other issues are simplified issues and there is plenty of authority in the books pertaining to them, but on this Tavares matter I am frank to say on independent research, and such as we have had from the files, it does not give us much light, and we are pioneering a new field, more or less.

Mr. John M. Martin: That is right.

Mr. Landrum: That is right. [342]

Mr. John M. Martin: The only thing I could suggest would be if I could make, or my brother make the opening statement, say, for 15 minutes and then the government would follow, because there are going to be a lot of things, I might state, that he is going to dispute.

The Court: I can see that as to the Tavares matter there should be before the jury interests of both the Tavares interests and the government's interests, because otherwise there may be some confusion. I am not going to determine, and will say that if the government feels it would be better to present its case when it opens its evidence, that is the proper and the normal and usual method, but I do feel there is something in what you say.

Mr. John M. Martin: For instance, in an effort to expedite this case,—

The Court: I am not so interested in expediting it as I am in clarifying it so that the jury will know what to do. [343]

Mr. John M. Martin: There is one exhibit, your Honor, which is a calculation of our option price as calculated by our accountant from an audit which he has made, which I have shown counsel, and I don't think he will take much time in questioning it. I will produce the man who prepared it.

Mr. Landrum: You won't have to put him on. I have examined it, and I will stipulate to their figures. Why bring in the records? I will stipulate that his figures are correct.

Mr. John M. Martin: We will save a week's time, if you will.

The Court: Fine. It looks like we are having a little pre-trial here.

Mr. Landrum: We have been having a pre-trial right along, your Honor.

Mr. John M. Martin: I have had our general accountant and administrative officer take from the government Defense Plant Corporation's records the original cost which the government incurred in the construction of the facilities, dredging and machinery, and I have had

him take our lease which provides an option price and the basis of depreciation, and I have had him calculate the depreciation and prepare an exhibit which shows the same numbers. For instance, take No. 2101,—have you a copy of it?

The Court: Have you seen that? [344]

Mr. Landrum: Yes, sir, I have seen it, and I agree to his figures.

The Court: You both agree to that?

Mr. Landrum: And it isn't necessary to put in any evidence. The whole question is what the Tavares had, and we agree to that figure of \$2,141,000.

Mr. John M. Martin: The only reason I put it in, if I may show the court the exhibit, it shows, as I say, No. 2101, and that is the original government record number. Counsel has all of those original records and his people have checked them. For instance, that is the administration building. My exhibit will show 2101, it will show the date when the building was constructed, it will show the general type of construction, it will show the actual cost and will carry forward the depreciation on the option price, and is identified by the number 2101, and that same number has been carried forward onto my model and map, so if I could give a copy of that exhibit to each of the jurors, so that they could follow it in sequence. Otherwise they will have to make notes and practically have to be shorthand reporters.

Mr. Landrum: They don't have to have any figures. We will agree on them.

The Court: Are you going to dispute the authenticity or the verity of the instrument we are talking about?

Mr. Landrum: No, sir. [345]

The Court: Why can't you both stipulate to its being received without calling witnesses in extenso on it?

Mr. Landrum: If that is all it is, but, your Honor please, I think he is going further with it.

Mr. John M. Martin: Another thing is to have the jury know the type of construction and that it was built.

The Court: Is this the instrument (indicating)?

Mr. Landrum: Yes.

The Court: You have seen it?

Mr. Landrum: Many times.

The Court: Now, is there anything about it, either arithmetically or otherwise, that you think is objectionable?

Mr. Landrum: Nothing except the statement that they have taken it from records of the government of the United States.

Here is the thing I objected to: "Option price as of December 23, 1944, of the Facilities and Machinery as Calculated by Gregory D. Smith"—

Mr. John M. Martin: That is our witness.

Mr. Landrum: "—from Assets-Property Record of Defense Plant Corporation."

Now, if there is an inference that they have by some method or means gone and gotten this information from us without our consent, or something from us, that is the thing [346] I feel is uncertain.

Mr. John M. Martin: We were furnished by the Defense Plant Corporation with a complete record of the government cost that was brought currently down to date from the inception of the work down to completion. It is a complete volume of this size (indicating) and every item on here we have taken from that, the actual figure that is set forth on the government record. Counsel has a copy of it, and we were in the hope that would all be clarified in advance of the trial.

Mr. Landrum: It is clarified. That is made from invoices of the Tavares Construction Company.

Mr. John M. Martin: And I will produce them.

Mr. Landrum: I don't want them. I don't see any necessity for going into all that. I will agree what your figure says at the end here, and I will so stipulate to it, that it is correct. What does it say? \$2,141,000?

The Court: That is right.

Mr. Landrum: I will stipulate to it. Why bring in the records?

The Court: Do you mean that you were going to object to the consideration of the component parts that make up that figure?

Mr. Landrum: I see no necessity for it, your Honor.

Mr. John M. Martin: Well, I want to prove the fair mar-[347] ket value of these facilities and machinery. For instance, in addition to the option to purchase the site and machinery, we were also given an additional option to purchase or negotiate for the lease or purchase of the facilities and machinery alone, as segregated from the site. Also, our original basic contract says that notwithstanding the affixing of the facilities and improvements to the realty, it shall be and remain personal property. Some place along the line some government attorney, not Mr. Landrum, may contend this action was for the condemnation of personal property, in part, and that I have failed to make a segregated proof by putting on a witness to prove the fair market value of the facilities and machinery. I want him to have the list and say that the fair market value of the facilities and machinery is so much.

Mr. Landrum: I contend it will be all right if he will say this: Counsel for the government and I have stipulated and agreed that the depreciated price, in accordance

with our contract, is \$2,141,000. We have prepared this list.

Mr. John M. Martin: Well, I will call our accountant and in three questions or in three minutes get all of it.

The Court: Why don't you accept his stipulation?

Mr. John M. Martin: Well, when we get through with this we will want you to know that is the option price as of the specific date. Now, we had a declaration of taking on De-[348] cember 23, 1944, and having to take some date for the option price of a lease that expires on December 31, 1949, if I thought he would take the theory that would run the maximum length of the lease, in which event the minimum shall be 15 per cent—well, I feel we have to start with the earliest date we could start with on the option, so I have had our accountant select the date of December 23, 1944, and I have had him calculate the option price as of that specific date.

Now, it is quite a task to make that calculation, and if there are other dates, it seems to me we have picked out at least one date the government witness would calculate from.

Mr. Landrum: That is the date of the taking, yes, sir, and we have agreed on the date of taking. I don't know what we are quarreling about. I can't see the reason why Mr. Martin isn't willing to say: We have prepared this thing, and we agree upon it. The thing I feel he should do is go ahead and say, "We prepared it, the Tavares Construction Company, and this is our exhibit. We did it."

Mr. John M. Martin: I will put the witness on and have our employee say he prepared it.

The Court: Let me make this suggestion, in the interests of clarity and proper expedition. Expedition is only secondary but it is important, of course. Why can't you both agree that the government, whatever that may mean, and all of the entities it may include, and the Tavares interests, [349] whatever they may include, have agreed that this exhibit correctly states the facts that are depicted upon it?

Mr. Landrum: That is right with me.

Mr. John M. Martin: That is perfectly agreeable with me.

The Court: All right. We will identify this now in the record as Tavares' Exhibit—where is our clerk? Oh, he is here.

What would the next Tavares exhibit number be? I am not talking about the interests of the City of National City, but of the Tavares Construction Company.

The Clerk: We have been going right straight through with the numbers, your Honor.

The Court: Yes. What will it be?

The Clerk: The next one is Q.

The Court: Then we will call it Defendant Tavares Construction Company's Exhibit Q, and that is agreed to as stated.

Mr. John M. Martin: Yes, your Honor.

Mr. Landrum: Yes, your Honor.

The Court: Then we will have that marked now so there will be no question about it.

Mr. Landrum: All right.

Mr. John M. Martin: It will be received in evidence as Exhibit Q?

The Court: Yes. [350]

(The document referred to was received in evidence and marked Defendant Tavares Construction Company's Exhibit Q.)

[Defendants' Exhibit Q will be found at page 1305 of this record.]

The Court: Two o'clock, gentlemen.

Mr. John M. Martin: I want to be sure, your Honor,—

The Court: One moment, Mr. Landrum.

Mr. John M. Martin: —when you said a moment ago that you did not want those exhibited to the jury, did you mean you did not want them brought into the court room at all until I have put a witness on the stand?

The Court: I think they ought to be left out. While I do not think the jury would receive any impressions from them they might be curious about them and might be looking at them, so let's not bring them out until the proper time.

Mr. John M. Martin: Yes. I just did not want to transgress your Honor's wishes.

The Court: Yes.

(Thereupon, at 12:15 o'clock p. m., a recess was taken until 2:00 o'clock p. m.) [351]

San Diego, California, Wednesday, February 19, 1947,
2:00 P. M.

(Thereupon the proceedings were resumed in the hearing and presence of the jury:)

The Court: All present. Proceed.

Mr. Sloane: If your Honor please, the witness Brennan wishes to make a correction. May I recall him?

The Court: Very well.

Mr. Sloane: Mr. Brennan.

JOSEPH W. BRENNAN

having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination

By Mr. Sloane:

Q. Mr. Brennan, in your testimony this morning you referred to 50 acres which the City had available for commercial leasing some time prior to 1942. Do you recall that? A. Yes, sir.

Q. Will you state when it was that the City had that much? A. In 1940.

Q. Have you made any inspection since you testified this morning?

A. Yes, sir. When I came up this morning, I swore to tell the truth, the whole truth, and nothing but the truth, [352] and I have found out that the area the Navy took was taken prior to Pearl Harbor and I thought it was after Pearl Harbor. So that made quite a difference in the acreage. It took off some 20 or 25 acres.

(Testimony of Joseph W. Brennan)

Q. Then, will you state how much acreage the City had left of this aggregate of small parcels available for commercial leasing in November, 1942?

A. Between 5 and 10 or 15 acres, somewhere along there. I didn't check that.

Mr. Sloane: That is all.

Mr. Landrum: No questions.

Mr. Sloane: The defendant San Francisco Bridge Company rests.

The Court: Proceed with the evidence on behalf of the Tavares Construction Company and the others on whose behalf you appear.

Mr. John M. Martin: If the court please, and ladies and gentlemen, my name is John Martin. This is my brother Frank Martin, and this is Mr. Charles Crouch, who represent the Tavares Construction Company and also the Concrete Ship Constructors. The Tavares Construction Company is a joint adventure composed of several parties, Mr. Stroud, Mr. Seabrook, Mr. Elliott, Mr. Tavares, Mr. Page, and Mr. Gates.

You will hear, no doubt, in the evidence here of the Ship Constructors and the Tavares Construction Company, but it all means the same. Certain documents, I think, will be [353] offered in evidence which will have the name "Tavares Construction Company" on them, but it was all done for the benefit of the Concrete Ship Constructors.

We now come to the second phase of this case and that is the Tavares Construction Company interests or the Concrete Ship Constructors. I will endeavor to tell you what we will attempt to prove in this case. It is a little

bit complicated but I will try and outline it so that you will better understand it.

The first part of this case has to do with the land. The second step of the case has to do with the shipyard and the facilities and machinery constructed upon that land.

The Tavares Construction Company interests arose, as we intend to show, through a lease which we had with the government. That lease was in the name of the Defense Plant Corporation, and there, again, we will call it the government. The Defense Plant Corporation is a government agency. And you may hear also mentioned the United States Maritime Commission, which is still of the government.

There will be those leasehold interests which are involved in this case. I believe the court will instruct you to determine what the Tavares Construction Company's interests were arising out of that leasehold interest.

Going back into 1941, on December 27, 1941, the Tavares Construction Company then held a lease on what was known as [354] Parcel 1 from the City of National City. The Tavares Construction Company entered into an agreement with the government, through the Defense Plant Corporation, by which the Defense Plant Corporation was to build a shipyard on this Parcel 1. The Tavares Construction Company, as the evidence will show, was sort of a contractor to build those facilities. They built those facilities at cost, without any supervisory fee for their services.

Then, by that same agreement, we had an agreement of lease, which we will offer in evidence, dated December 27, 1941, by which the Defense Plant Corporation leased the shipyard to the Tavares Construction Company for use by the Concrete Ship Constructors in constructing

ships. The Tavares Construction Company stated in building a shipyard on Parcel 1 early in 1942.

Later on, as the evidence will show, it became desirable to increase the size of that shipyard, and that the government started out to condemn this entire area shown on the map. That was to be the site of this enlarged shipyard. This agreement of lease, made with the Defense Plant Corporation, was amended from time to time so as to cover the enlarged facilities and the entire site. [355]

We get down to the date of November 10, 1942, when the government filed this condemnation suit to acquire the title to the lands, the entire area of the parcels from 1 to 11, and parcel A. On the next day, on November 11th, the Defense Plant Corporation amended the agreement or the lease with the Tavares Construction Company.

Now, when we get up to that time, I would like to explain to you a bit what that lease covered. We intend to show by the evidence that under that lease, and the one which you are now being called upon to evaluate in this proceeding is the lease as it existed after November 11, 1942, which covered the entire parcel, that lease gave to the Tavares Construction Company certain rights. The evidence, we intend to show, will show that that lease ran until December 31, 1949. It provided for a termination at an earlier date at the option of either party, at any time when the use of that property or this shipyard was no longer needed for the construction of boats by the government. It provided that the Tavares Construction Company was to pay certain rents to the government, so much per ship constructed until the entire cost of all the facilities and the entire property had been paid for; in other words, until the government had gotten back all the money it had spent in constructing that shipyard.

I believe the evidence will show that that condition [356] arrived along about September of 1944, when the rental payments equaled the total cost to the government of the entire shipyard, plus 4 per cent interest on it.

From then on the Tavares Construction Company was to have the use of the property rent free. There are certain other rights granted in that lease. The evidence will show that, first, as I stated, there was to be no fee charged for the construction of the facilities, they were constructed at cost, and, also, there was a guaranteed cost on it, that it would not exceed so many dollars, and if it did, why, the Tavares Construction Company had to pay the excess. But in return for that the Tavares Construction Company had these possessory rights, they had certain options and they had the right to purchase the entire shipyard and all the land at the cost to the government, less a certain formula for the depreciation on the shipyards' facilities and machinery.

Now, we will show that that shipyard was designed and constructed for a post-war use. We will show that the basins—well, we will show that instead of building ships upon the land like most shipyards are constructed, where they construct the ship up on top of the land, and as you no doubt seen pictures of, when they launch a ship they slide it down into the water from a way; but this shipyard had basins which extended below sea level, and the ships were constructed down in that basin, and when they got ready to [357] launch the ship, they would raise the gate and let the water from the ocean into the basin, and they would float the ship, float it out through the

gate. That had a great advantage over other type ship-yards, in that it could also be used as a dry dock for the repair of ships, and for other uses. For instance, all they had to do was to raise the gate, let the water in, float the ship out, then close the gate, pump out the water and then it was a dry dock and they could repair a ship there, paint it, do whatever they had to.

Now, along two years after the government started suit to condemn the land and take the property, on December 23, 1944, the government took our leasehold right. They took away from us the agreement or lease, and took away all of our rights under it. We intend to show by our evidence that that was a very valuable right, and while the government, as a sovereign power, has the right to take property from individuals, yet the Constitution says they shall receive just compensation therefor, and I believe the court will instruct you that is what you are to determine here: how much just compensation the Tavares Construction Company is to receive for these rights which have been taken away from them.

Thank you.

The Court: Proceed with the evidence. Call your witnesses.

Mr. Crouch: May we have a moment, your Honor? [358]

The Court: Surely.

Mr. John M. Martin: If the court please, John M. Martin speaking. I will call as our first witness Mr. Eisenman, who has previously been sworn and testified.

T. W. EISENMAN,

called as a witness by and on behalf of the Tavares Construction Company, having been previously sworn, testified further as follows:

Direct Examination

By Mr. John M. Martin:

Q. Mr. Eisenman, I will ask you if you have prepared a model to depict the condition of the shipyard as it existed on December 23, 1944?

A. Yes, I have prepared such a model.

Q. Have you also prepared maps to indicate the conditions and the soundings as they existed on that date?

A. I have prepared such maps.

Mr. John M. Martin: If the court please, I would like to produce the model and the maps at this time.

The Court: Very well.

Q. By Mr. John M. Martin: Are they in the adjoining room, Mr. Eisenman?

A. Yes, they are. I think we are going to need some help with them.

The Court: You will have to move that easel back a [359] little bit, so that the model can be placed on two chairs here, probably. Or, if you want to move that panoramic view there, the model can perhaps be placed on the table.

Now, have you all of the paraphernalia here?

The Witness: I think most of it. There is a little more out there, your Honor.[360]

Q. By Mr. John M. Martin: I will ask you, Mr. Eisenman, if you have placed the model so that it faces the same way as the land actually lies and the water.

A. I don't know what you mean by that, Mr. Martin. Do you mean in a true direction north?

(Testimony of T. W. Eisenman)

Q. Yes. Can we do that?

A. I don't know just where north is. Is it right through here?

Q. Is it approximately the same?

A. I would say approximately so. I imagine true north is about through here and true north on this map is about through here.

The Court: It isn't placed, then, in a position in which we find the literal National City here? It is on the Coronado side the way it lies, isn't it?

The Witness: What is the question?

The Court: Will you read it?

(Question read by reporter.)

The Court: That is, the way the model lies.

The Witness: I don't believe so.

The Court: Doesn't it?

The Witness: No.

The Court: All right; go ahead.

Q. By Mr. John M. Martin: Will you explain to the jury, Mr. Eisenman, whether this model was prepared to scale [361] and what the scale is?

A. Yes.

Q. And also explain to them anything else that you feel they need to understand from what you have attempted to depict thereon.

A. May I go down to the model? Q. Yes.

A. This model has been prepared on a linear scale of 1 inch equals 50 feet, that is, if we take a distance of an inch on the model, it would represent 50 feet on land, or I might say that the easterly boundary from here to this point here represents 1849 feet, and on the southerly boundary from this point here, which is the southeasterly

(Testimony of T. W. Eisenman)

corner, out to the pier head line, is a distance of 2172 feet. All the improvements shown hereon are to scale as nearly as we could make them. The wet docks or the dry docks are shown. There are the four of them as you have seen, and the other docks, the large gantry cranes, one for each dock, and one steam crane, and all the mill buildings, the light poles, the bulkhead storage racks, the pier and even down to the ships. These represent the last ships that were built. They are lighters. This vessel is 265 feet long and 48 feet wide. So that from that you can get an idea of the relative size of the various features. All of the electrical installation on the project is underground with the exception of the light poles. [362] The actual flood lights, to permit night working, represented a great expense and resulted in a very useful situation, so that the other cranes, the mobile cranes, such as truck cranes and other cranes that are not shown hereon, could operate through the yard without the interference of the overhead lines. The mold lofts are shown and you can see here that they are these on this large flat, plain surface, to be used as drafting tables, There is one here and one here. And then here are the assembly lofts for assembling the steel deck houses, and this area back through here is used for reinforcing steel storage. The reinforcing steel was actually worked in this area and back through here. Probably the largest reinforcing steel fabrication installation that was ever built in California was in this very area. The ships use a considerable amount of reinforcing steel and the steel had to be accurately fabricated, much more so than when it is used in connection with a building. That is why the reinforcing steel layout was so extensive. In addi-

(Testimony of T. W. Eisenman)

tion to that, you have your carpenter shops where the forms were made and repaired. You have your machine shop and your electrical shop and your compressor room, where the large compressors were installed to feed the compressed air to the project, and your warehouses here and here, the field office and administration building and personnel building, and another warehouse, and then the bulkhead storage racks. It was [363] found early in the shipbuilding program—

Mr. Landrum: Just a moment, if the court please. I do not feel the witness should go to that extent. He has now explained the model and we object to the statement he has made as being argumentative and evidentiary.

The Court: There may be a little deduction there in the last statement instead of being descriptive. Just confine yourself for the present to a descriptive narrative.

The Witness: I think probably I have covered the installation, unless there is some question that someone has.

Q. By Mr. John M. Martin: I would like for you to explain the location of the batching plant. Is that illustrated by your model?

A. Yes; the batching plant is on the easterly side of the project proper. It was separated by a right-of-way of the Santa Fe and the separation was so great on this southerly end, and there were so many tracks and features of the Santa Fe in here, that we built the batching plant on a separate little plat of its own, in order to eliminate the extra work that would be required in order to show the tie plant and so on that belongs to the Santa Fe. This batching plant was used all the way through the project for the dry batching of concrete aggregates, which con-

(Testimony of T. W. Eisenman)

crete aggregates came in by rail from the north, and we had a spur on each side. This spur here was at the site when we started building and this [364] spur here was added. The bins that you see here were where the aggregates were unloaded and stored. And a very special sand was required, that was manufactured originally at Otai. This sand was brought in by trucks and dumped over this runway into the bins and then it was brought out and up to the hopper, where it was dry mixed. It was hauled by truck over the public highway and then hauled to the mixers.

Q. Will you explain the location of the pier head line and the bulk head line on that model?

A. The bulk head line is right here. In fact, the bulk head is built along the bulk head line here. The first two docks were built on so-called Parcel 1 and they were built for the purpose of constructing only five ships and, in consequence, we didn't feel that it warranted the expense of moving out over the water to the bulk head line. On the original land, which is 80 feet in here, there was a dike and it ran down to the water here. It represents quite an expense to build a bulk head along this deeper water. So the first two docks were built back of this 80-foot offset line.

Q. Of what was the bulkhead constructed?

A. The bulkhead that is here is constructed of steel H piles and precast reinforced concrete slabs. It is quite a novel design that I don't believe has ever been used before. However, it resulted in quite an economic and satisfactory [365] bulkhead.

(Testimony of T. W. Eisenman)

Q. How is the pier line indicated on the model?

A. The pier head line is marked here with a little white tab, with typewriting on it, and also depicted by the line here.

Q. What is the distance from the bulkhead to the pier head line?

A. The distance from the bulkhead to the pier head line is 1,000 feet.

Q. And what do the various colorings in the water portion indicate?

A. The light green represents the areas as we found them, that is, in December of 1941, before we did any dredging. The light blue represents the area that we dredged 16 feet to provide an entrance from the channel. It was dredged 30 feet on the north and another entrance on the south. This square here was not dredged, as it was not required, and we didn't feel it required the extra expense. The area in that deep blue area adjacent to the pier was dredged to 20 feet and that was dredged in order that we might have deep water for those ships. It was required that those ships be tested much more severely than a steel ship, as they were in an experimental stage, and we used this.

Q. What was the approximate total area of Parcel A in acres? [366]

A. Parcel A is approximately 30 acres.

Q. Of that total 30 acres, what is the total area that you dredged?

A. Approximately 18 acres.

Q. Of what type of construction was the pier?

A. The pier was built on creosoted wood piles, with a flat slab concrete deck.

(Testimony of T. W. Eisenman)

Q. In general, what was the type of construction of the wet basins?

A. There are two types of construction used in the wet basins. On the original docks they were built with wood and sheet piles, that is, two large pieces of wood. In this case they were 8 x 12's and they had grooves in the sides of them, and each one of these sheet piles is driven one next to the other, and in those grooves there was a 2 x 4 to form an actual seal so the sand couldn't run in. And the bottoms of the docks were built with 14 x 14's on top of piles that were put there to stop the ship. As I recall, there were about 750 to 800 untreated wood piles in each dock for the purpose of supporting the ship. That applies to these two docks, Docks 1 and 2. Dock 3 and Dock 4 were built with steel sheet piles, a much more expensive type of installation and an installation that has a much longer life than the wood piles.

Q. How much longer life? Can you estimate for us the [367] difference?

A. I would say in my opinion about 40 years.

Q. What would you estimate the life of the docks 1 and 2? A. About 10 years.

Q. Have you prepared a map which shows the soundings that you took before you commenced dredging in Parcel A? A. Yes; I have.

Q. Will you produce that map here?

A. This is the map here.

Mr. John M. Martin: Let's hang it on the easel. If the court please, I offer in evidence, as Concrete Ship Constructors' Exhibit R, the model which I expect to use for purposes of illustrating the testimony which will follow.

(Testimony of T. W. Eisenman)

Mr. Landrum: Is R the correct initial, Mr. Clerk?

The Clerk: Yes; R.

Mr. Landrum: No objection to R, your Honor.

The Court: It may be received and so marked.

(The model referred to was received in evidence and marked Defendant Concrete Ship Constructors' Exhibit R.) [368]

[Defendants' Exhibit R—Model of shipyard as of December 23, 1944. See original.]

Mr. John M. Martin: We offer in evidence as Concrete Ship Constructors Exhibit S the map which the witness has just presented.

Mr. Landrum: No objection to Exhibit S, your Honor.

The Court: So received and so marked.

(The document referred to was marked Concrete Ship Constructors' Exhibit S, and was received in evidence.)

[Defendants' Exhibit S—Map of shipyard of December 23, 1944. See original.]

Q. By Mr. John M. Martin: Now, Mr. Eisenman, one further question about the model. I notice numbers are shown on each of the major facilities here depicted. What number have you used?

A. The numbers shown hereon are the page numbers in the Defense Plant Assets-Property Record, which described in detail each of these features, together with the cost and all the pertinent information for each feature.

(Testimony of T. W. Eisenman)

Q. Does the map which you have just produced show those same numbers? A. It does.

Q. So that the same statement would be true with reference to the map? A. That is correct.

Q. Now, will you explain to the jury and to the court what you have attempted to depict upon this map, particularly with reference to the soundings, by whom they were made, the [369] approximate date, as to parcel A?

A. This map is virtually a plain reproduction of the model or of the site which is represented by the model. In addition, it has the soundings shown in the Bay, the soundings that were taken in the fall of 1941 and the spring of 1942, or the winter of 1942. These soundings, as has been explained before, represent the elevations of the land prior to our dredging, and show the distance above or below mean low low water that the land was in each position when we first started our investigation for the development of the shipyard. Also, there is shown hereon the areas that had been dredged. The area that has been dredged minus-16 is the area that is shown in the light blue there. The area that has been dredged minus-20 is shown in the dark blue.

It will be noted on the westerly side of the dredging that the dotted line that outlines the dredging does not go quite to the channel. The reason for that is that from here to the channel the water depth was in excess of the 16 feet that was required, so there was no dredging necessary. The same here on the south.

(Testimony of T. W. Eisenman)

Q. Can you give us, Mr. Eisenman, the approximate cost of the dredging that was performed by Concrete Ship Constructors prior to the date of November 10, 1942?

A. The approximate cost of the dredging prior to what date? [370]

Q. Well, first give us the total date, if you desire, and then approximate that portion prior to November 10, 1942.

The Court: Total date,—what do you mean by that?

Mr. John M. Martin: I beg your pardon. The total amount.

The Witness: The total expenditure for dredging was approximately \$109,000. As I recall, that represented approximately, oh, around three hundred ten or three hundred fifteen thousand yards, and as I understand it, as I checked the record here a short while ago, I believe that about \$74,000 worth of dredging had been accomplished at the date referred to.

Q. By Mr. John M. Martin: You mean on November 10, 1942? A. November 10, 1942.

Q. Can you give us an approximation of the total acreage involved in the total site of this shipyard?

A. The total site, including all the land, as well as the so-called water or land, was approximately 100 acres. That is on this side (indicating), not including the batching plant.

Q. Is the map which you have identified drawn to scale?

A. Yes, it is drawn to the same scale as the model, of 50 feet to the inch, and shows all the features that the model shows. [371]

(Testimony of T. W. Eisenman)

Q. Does the map accurately portray the site, as it existed on or about the 23rd of December, 1944?

A. It does.

Q. In other words, there had been no dredging done at a date which is not reflected by the figures you have just given?

A. I am sorry. I don't understand you.

Q. In other words, there had been no dredging performed in addition to the \$109,000 value you have given?

A. Up to 1944, December, 1944?

Q. Yes, up to December 23, 1944.

A. That is correct.

Q. Does the model, in your opinion, fairly accurately depict the conditions as they existed in the shipyard on December 23, 1944?

A. It does.

Q. You may be seated. Oh, just a minute. Have you also prepared other maps here?

A. Yes, I have some photostats of some maps from our files.

Q. What, in general, do they show?

A. Well, you will note that this large map does not include the batching plant. They show the batching plant.

Q. Can you tell us when you first commenced actual dredging on parcel A? [372]

A. August 28, 1942.

Q. Can you give us the date when you first entered upon and commenced work on the other parcels, by number?

A. I am afraid I can't. On the other map the dates are so stated. I can give the approximate dates, but to the day, I couldn't do it.

(Testimony of T. W. Eisenman)

Q. Were some of those before November 10th and some subsequent? A. 1942?

Q. 1942.

A. Yes, I believe that—no, I believe that all of the parcels had been occupied by November 10, 1942. There is one question in my mind; parcel 8, but I don't believe we have a record of that.

Q. Is there anything in these other maps which you feel is essential to a complete understanding? I note the map you have just prepared or identified does not show the batching plant; is that correct?

A. That is correct.

Q. And the other maps do show the batching plant?

A. They do, and that is the only addition, is the batching plant.

Q. For the time being I will not offer them, Mr. Eisenman. A. Fine. [373]

Q. Have you also some photographs, that were taken by you, which fairly depict the condition of these facilities as they existed on December 23, 1944?

A. I have.

Q. Just be seated. I hand you a photograph which bears the date on the reverse side of November 15, 1942, and ask you if you took that picture.

A. Well, I couldn't say whether I personally took the picture. If I didn't take it, it was taken under my direction. I may have taken the picture.

Q. Can you say whether it accurately sets forth the condition of the facilities as they existed on about that date? A. It does.

Mr. Landrum: There is no objection to that when we get a number for it, your Honor.

(Testimony of T. W. Eisenman)

Mr. John M. Martin: I offer it as Concrete Ship Constructors' Exhibit T.

The Court: So ordered.

(The document referred to was marked Concrete Ship Constructors' Exhibit T, and was received in evidence.)

[Defendants' Exhibit T—Photograph of shipyard or portion thereof. See original.]

Q. By Mr. John M. Martin: I hand you, Mr. Eisenman, a photograph which bears the date August 25, 1944, and ask you if that picture was either taken by you or under your [374] direction.

A. I personally took this picture.

Q. You believe it to fairly show the condition as it existed within the view of that picture on that date?

A. Yes.

Mr. Landrum: No objection to that picture, your Honor.

Mr. John M. Martin: I offer it in evidence as Concrete Ship Constructors' Exhibit U.

The Court: So received.

(The document referred to was marked Concrete Ship Constructors' Exhibit U, and was received in evidence.)

[Defendants' Exhibit U—Photograph of shipyard or portion thereof. See original.]

Q. By Mr. John M. Martin: I hand you a photograph dated August 25, 1944, and ask you whether that picture was taken either by you or under your direction.

A. I believe I took the picture personally.

(Testimony of T. W. Eisenman)

Q. You think it fairly states the subject?

A. It does, well.

Mr. John M. Martin: I offer in evidence the photograph just identified as Concrete Ship Constructors' Exhibit—

The Clerk: V.

Mr. John M. Martin: —V.

Mr. Landrum: No objection to what I understand has been marked U, your Honor, nor is there any objection to Exhibit V.

The Court: Very well. So ordered. [375]

The Witness: There is a duplication there, your Honor. There are two pictures there that are the same. Two of those pictures are the same.

The Court: The witness says those are the same. There are so many pictures here that they will not be illustrative. Can't you limit the number of photographs?

Mr. Landrum: It has been a little confusing to me, your Honor. There were some photographs introduced just like this, I think, by the City of National City, but I don't know whether they are duplicates or not.

Mr. John M. Martin: I am endeavoring to avoid a duplication, if the court please. That is the reason for the delay.

The Court: The witness might be able to assist you.

The Witness: There is only one duplication there.

Mr. John M. Martin: That is all the photographs I desire to offer at this time, because I do not care to duplicate. I want to check further.

The Clerk: Do you withdraw Exhibit V?

The Court: There are two Vs here now.

The Clerk: V is the same as U, your Honor.

(Testimony of T. W. Eisenman)

The Court: That is the same photograph.

Mr. John M. Martin: I would like to substitute what I now offer as Exhibit V, and withdraw the original exhibit V.

The Court: All right. So ordered. [376]

Q. By Mr. John M. Martin: I ask you if what purports to be a picture, which I now hand you, and which has been identified as Exhibit V,—I will ask you to state what it is.

A. This is an aerial photograph made by the United States Navy for Concrete Ship Constructors, and we requested that this photograph be made for our use in the construction of the yard, for planning purposes. The date, I believe, was stamped on the back here. June 14, 1943. It shows a view, a vertical view of the entire yard layout.

Mr. Landrum: There is no objection to Exhibit V, your Honor.

Mr. John M. Martin: I offer the aerial photograph as Exhibit V.

The Court: So received.

(The document referred to was marked Defendant Concrete Ship Constructors' Exhibit V, and was received in evidence.)

[Defendants' Exhibit V—Airview photograph of shipyard. See original.]

Mr. John M. Martin: May I now hand these photographs to the jury?

The Court: Yes. You had better have that last one marked, first.

(Testimony of T. W. Eisenman)

Mr. John M. Martin: Yes.

(The photographs were handed to the jury.)

Q. By Mr. John M. Martin: Mr. Eisenman, will you use [377] Exhibit V, and with your pointer indicate thereon the location of the same area that is depicted by the map and the model which is received in evidence?

A. I will.

Q. —so that the marginal limits may be known to the court and jury? A. Yes.

Mr. Landrum: Shall I help you hold it?

The Witness: Let's turn it around so it is about the same as the model.

You can see here is this pier, this north line, this line here is right out through here. It runs off the picture at this point for a short ways. Then the east line runs right down along here. You can see the fence almost going right down there. The south line, this line here, runs right in front of the Administration Building, and heads out towards the pierhead line. The pierhead line would be about out here, as you can see on the model.

Mr. John M. Martin: You may cross-examine.

Cross Examination

By Mr. Landrum:

Q. Mr. Eisenman, I would like to ask you just a few questions.

Mr. Landrum: This is probably not exactly cross examination, your Honor. [378]

Mr. John M. Martin: So far as I am concerned, I will not object upon that ground, if the court please.

Q. By Mr. Landrum: For the purpose of the record, I want to try to clear up who is the Tavares Construction

(Testimony of T. W. Eisenman)

Company, who is the Concrete Ship Constructors, and what the relationship of yourself and Mr. Tavares and Mr. Seabrook and Mr. Elliott is. Is it all the same thing when you get down to the bottom of it?

A. Well, I can probably answer it best by telling you what each entity is. The Tavares Construction Company—

Q. Well, counsel in his opening statement said, "When we refer to one, it is all about the same thing." I would like to get that in the record.

A. Well, the Tavares Construction Company is a California Corporation. Concrete Ship Constructors is a joint venture composed of Tavares Construction Company, Lloyd Stroud, R. S. Seabrook, and C. M. Elliott.

The Court: That is an unincorporated entity?

The Witness: An unincorporated entity.

Q. By Mr. Landrum: I want to know whether or not the Concrete Ship Constructors claim an interest through the lease of the government of the United States or the Defense Plant Corporation to Tavares? That is what I am trying to get at.

Mr. John M. Martin: If the court please, I think counsel [379] had better answer that question. As a matter of fact, it is covered by a stipulation made on pre-trial. The fact is that all of the rights held by Tavares Construction Company were held in trust for the use and benefit of the joint venture, doing business under the firm name and style of Concrete Ship Constructors.

The Court: There is a stipulation.

Mr. John M. Martin: That is true.

Mr. Landrum: I didn't know that. That is what I wanted to know, your Honor. That is all.

(Testimony of T. W. Eisenman)

Mr. Sloane: I have a question.

Q. By Mr. Sloane: Mr. Eisenman, I am interested in the subject of dredging which you touched upon.

A. Yes, sir.

Q. I understood you to say that prior to November 10, 1942 there had been no dredging in the area referred to.

A. No dredging by Tavares Construction Company.

Q. There had been dredging by others?

A. I am sure there must have been.

Q. Do you know who did that dredging, and where?

A. Well, not to my certain knowledge. I understand that the San Francisco Bridge Company did dredging in that area.

Q. When did your dredge start work in the area?

A. August 28, 1942. [380]

Q. Can you tell us where they first started to dig?

A. Yes. I can probably show you best. The first work was started in this area here (indicating). The reason for that—

Mr. Landrum: For the purpose of the record will you state where you were pointing?

The Witness: I was pointing to the area south of the finger pier, just bayward from the bulkhead line.

The Court: That is in parcel A?

The Witness: That is in parcel A. The reason it started there, the first ship was built in this dock.

Q. By Mr. Sloane: I didn't ask for the reasons. So far as my question goes, I simply wanted to locate it.

(Testimony of T. W. Eisenman)

Now, can you tell us or indicate on your model where parcel 7 has its northerly boundary?

A. Well, parcel 7 would be approximately in the area that lies toward the water from where the pointer is.

Q. You are indicating the northerly boundary as falling approximately half-way between the drainage dock—

A. Well, the northerly boundary is right along this telephone post, a sloping line that came against here (indicating), something like that.

The Court: Are you pointing out in the terrain?

The Witness: Well, it goes out in the water there. The line would come through up in here (indicating), starting [381] from the bulkhead line. As I recall, this property is about 205 feet perpendicular to about 218 or 219 feet on the slope here. Then it runs parallel, southerly and parallel to this line down to a point that is about 200 feet or so south of this mole line, where they intersect here. The exact distances I don't remember.

The Court: That isn't a portion of the area in which there was any dredging that you testified to?

Q. By Mr. Sloane: That is the land portion?

A. That is the land portion.

Q. The dredging would be towards the water from the portion you just described?

A. Yes.

Mr. Sloane: I don't want to disturb this work of art, but could I get you to make a little bracket in red where parcel 7 would follow in its extent north and south?

Mr. John M. Martin: Would it answer the same thing to put it on the map?

Mr. Sloane: Well, I don't know if I am smart enough to transfer it from the model to the map. I want to get it on both.

(Testimony of T. W. Eisenman)

Mr. John M. Martin: Very well.

The Witness: May I refer to the exhibit up here, which has some dimensions on it.

Mr. Sloane: Yes. [382]

The Court: Refer to those by Exhibit numbers, the exhibit on the stand.

Mr. John M. Martin: May we approach the bench, your Honor?

The Court: Yes.

(A discussion was had between the court, Mr. John M. Martin and Mr. Landrum, outside the hearing of the jury, as follows:)

Mr. John M. Martin: I desire to call as my next witness our accountant, who prepared this exhibit Q which has been received in evidence, and have him very briefly explain what it shows. Now, I have had extra copies of that exhibit made so that the jury, instead of having to make notes, may have that copy before it, with the long descriptions of each piece of property identified on the map and identified on the model, with the record of whatever the cost, as shown by the government's records was. The jury can't make notes of all of that and it seemed to me since I have extra copies that I might properly have the jury have them, with the court's explanation of what counsel and I have agreed to as to the admissibility of the exhibit.

Mr. Landrum: The government will object to that tabulation being given to the jury, your Honor, and to each of them having a copy of it upon the ground and for the reason that under the stipuation it is absolutely unnecessary. We have [383] agreed to the amount of

(Testimony of T. W. Eisenman)

the depreciated value, and I see nothing to be gained by handing them a tabulated statement of evidentiary matter.

The Court: If the copies are true copies of that exhibit,—

Mr. John M. Martin: They are.

The Court: —and contain nothing but what is on the exhibit,—

Mr. John M. Martin: Yes.

The Court: I should think that would facilitate matters, rather, for them to have 12 copies of the exhibit instead of having them pass one copy around amongst them.

Mr. Landrum: I don't have any particular objection, except the general objection that the jury is then carrying around a lot of papers.

The Court: Oh, we will not let them carry them around. They will have to leave that here when they leave the court room.

Mr. Landrum: Then I don't have any objection, your Honor.

Mr. John M. Martin: I wish to use the same practice also when I call Mr. Tavares and have him explain a calculation that he has made as to the fair market value of these facilities or as to the replacement cost. It will identify the same figures as used in this, but will illustrate the [384] calculation, and after that has been received in evidence, if it is received in evidence, I would like for the jury to have a copy of what has been received in evidence so they may follow the figures of the calculation.

Mr. Landrum: I don't see any necessity at all, your Honor, in view of the fact I have stipulated as to what the figures are.

(Testimony of T. W. Eisenman)

Mr. John M. Martin: No, the exhibit I am talking about now is one I have here. This is one I haven't had a chance to hand you. It will be an exhibit showing tabulated figures that he has made as an expert in calculating the fair replacement cost of the facilities and machinery as of December 23, 1944, and he takes as his basis the actual cost as set forth in Exhibit Q and shows the facts that it does not include.

The Court: I do not believe that is the proper way to proffer an instrument.

Mr. John M. Martin: I will not offer the duplicates. I will simply offer the original and after the original is received in evidence, then, in order that the jury may have some memorandum of those figures, and so as to follow the evidence, ask to hand them a copy.

The Court: I think that is what we have a reporter here for, to take down the evidence.

Mr. John M. Martin: Very well.

The Court: The reporter has to write it all down, and [385] then you can refer to it in your argument, but I do not believe it is proper to follow the other course.

Mr. John M. Martin: Very well.

The Court: The objection is sustained.

(Thereupon the proceedings were resumed within the presence and hearing of the jury:)

Q. By Mr. Sloane: Mr. Eisenman, you have drawn a light red line on the model, showing the outline of the property which was under lease by the City of National

(Testimony of T. W. Eisenman)

City to the San Francisco Bridge Company; is that correct?

A. I have drawn the land portion of it, which I know to have been under lease, and have also indicated a water portion that I have been told has been under lease.

Q. Yes. Now, with reference to the water portion, am I right in saying that that had been dredged to a depth of 10 feet before you began your dredging, and that you then dredged it down to 16 feet?

A. Well, I would say that the soundings would display the depths to which it was dredged. I have never observed whether or not that entire portion was dredged to 10 feet prior to our occupation.

Q. At any rate, what you did was to begin with the bottom, as it was in November, 1942, on November 10th, and then went deeper to reach a total depth of 16 feet?

A. That is correct. [386]

Mr. Sloane: That is all.

Mr. Muir: May I ask the witness one question on behalf of the Johnsons?

The Court: That is what I wanted to avoid. I am going to avoid it from now on, but since I have permitted other counsel, you may proceed.

Q. By Mr. Muir: Mr. Eisenman, my one question is with reference to the batching plant of the Concrete Ship Constructors, being this part of the model (indicating), was that located on the Johnson's property?

A. A portion of the batching plant was on the Johnsons' property.

Q. Could you indicate on the model how much of it?

A. Well, I might be able to. I may need some reference on that, too. A little stretch of land here that start-

(Testimony of T. W. Eisenman)

ed in here at 15th Street, 15th Street is here (indicating), and the land was just wide enough to allow this ramp to come up. Then it went down to 14th Street, which, as I remember it, should be about here (indicating) on the model. [387]

Mr. Muir: The witness indicating, in pencil, the area referred to.

The Witness: Something like that, sir; this from here up to here; the narrow street from 15th up through approximately to 14th, and then the rest of Johnson's property, including half of a vacated street here.

Mr. Muir: That is all. Thank you.

Mr. Landrum: I would like to ask one or two questions on cross examination.

Cross Examination

By Mr. Landrum:

Q. Mr. Eisenman, what would you call the heart or the most important part of that shipyard? The most important part of that shipyard is where you build the ships, isn't it? A. These docks.

Q. And are you now pointing to right through here where the San Francisco Bridge Company had a lease?

A. No, sir. I point out another water front where these docks are built.

Q. You pointed in here, didn't you?

A. That is 1, 2, 3, 4; yes.

Q. The San Francisco Bridge Company had a lease which was about like this? You have marked it on here. That is right, is it not? [388]

A. That is correct.

(Testimony of T. W. Eisenman)

Q. Would your shipyard have been any good without any of the land?

A. This portion of it, we wouldn't have built the docks on. We would have probably built here if we didn't have that land.

Mr. Landrum: All right; that is all.

Mr. John M. Martin: Mr. Smith, please.

GREGORY SMITH,

called as a witness by and on behalf of the Concrete Ship Constructors, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Gregory Smith.

Direct Examination

By Mr. John M. Martin:

Q. By whom are you employed, Mr. Smith?

A. The Concrete Ship Constructors and the Tavares Construction Company.

Q. In what capacity?

A. In an administrative capacity.

Q. During what period of time have you held that position? A. Since January 9, 1942.

Q. Are you familiar with the Defense Plant Corporation [389] records relative to the facility construction and cost of construction at this shipyard?

A. I am, sir.

Q. Have you from those records calculated the actual cost as to the various items of the facilities and machinery and calculated the depreciation thereof, as set forth in the lease? A. I have, sir.

(Testimony of Gregory Smith)

Q. And prepared a writing which has been received in evidence here through agreement of the government and counsel for the Concrete Ship Constructors, Exhibit Q? I hand you Exhibit Q.

A. Yes, sir. This is it.

Mr. Landrum: If the court please, may the record show we stipulated and agreed that Exhibit Q was a correct calculation of the depreciated value of those facilities, in accordance with the contract between the parties?

Mr. John M. Martin: It is so stipulated.

The Court: So understood. Ladies and gentlemen, this instrument has been prepared conjointly and co-operatively by the litigants in this case. It may be so considered.

Q. By Mr. Martin: Do you have additional copies of that, so that I may use them, Mr. Smith?

A. Yes. How many copies do you want?

Q. Will you give them to me, please? [390]

A. How many do you want, please?

Q. Enough so that counsel and each member of the jury and the court may have one.

Mr. John M. Martin: With the permission of the court, I am handing to each member of the jury a copy of Exhibit Q.

Mr. Landrum: If the court please, I thought that was what we discussed at the bench. Wasn't it?

The Court: No. We discussed other matters. Ladies and gentlemen, this is simply for your convenience and facility. You are not to read into this copy anything that is covered by the stipulation which I just told you about. This document and instrument was prepared conjointly and it was agreed between all of the litigants that it cor-

(Testimony of Gregory Smith)

rectly portrays the matters that are stated herein. There is nothing else to be inferred from this instrument except anything that would logically and reasonably be inferable from that statement. And each of you please leave those documents here when you leave tonight. Don't take them home with you. Leave them here for your use later on. Proceed.

Q. By Mr. John M. Martin: Mr. Smith, you prepared this exhibit at my direction? A. Yes, sir.

Q. And you prepared it using your copy of the Defense Plant Corporation asset record?

A. The asset property record. [391]

Q. As to this type of shipyard? A. Yes, sir.

Q. I note that this exhibit shows a number. For instance, the first item there says, "Schedule 1-A." What is meant by "Schedule 1-A"? Does that refer to the formula set forth in the lease, the Defense Plant Corporation lease?

A. This 1 and 2 are handled together as one classification and the rest of the schedules follow the formula.

Q. By the "formula" you mean the formula for depreciation? A. Yes, sir.

Q. And this next number showing, for instance, "1101"—what does that indicate?

A. That is a page of the asset property record.

Q. And the numbers, for instance, that are shown on this model or on the map that has just been received in evidence—do they mean and refer to the same numbers as you have set forth in this lease?

A. They refer to the same numbers as set forth in this lease.

(Testimony of Gregory Smith)

Q. For instance, the item you show as No. 2101 is electric shop and compressor building? A. 2102.

Q. By that I am to understand that No. 2102 on either the map or the model referred to the same structure? [392] A. That is right.

Q. Namely, the electric shop and compressor building?

A. Yes, sir.

Q. Following, under the heading of "Description"; is the description as there set forth also taken from the government record?

A. Yes, sir. It has been condensed in some cases.

Q. Then, on the final page of Exhibit Q, you have a recapitulation or a summary sheet. Will you state and briefly explain what you have endeavored to show and how you have arrived at that recapitulation?

A. I have endeavored to show the option price applying to each classification of the facilities and machinery, the rates of depreciation called for under the formula, and deducting that depreciation from the original cost and arriving at a depreciated value or the option price.

Q. What did you find the total original cost to the Defense Plant Corporation of the facilities and machinery here constructed and installed to be?

A. \$2,647,067.95.

Q. You have made a calculation of the total amount of depreciation of the facilities and machinery down to December 23, 1944. Where do you show that figure and what is the amount of such depreciation?

A. On the last sheet it is shown at the bottom of the [393] column headed "Depreciation," and the amount is \$505,831.46.

(Testimony of Gregory Smith)

Q. Then, in arriving at the option price, you have deducted from the total cost allowable depreciation under the terms of the lease, to December 23, 1944, and arrived at an option price of what amount and where is it shown?

A. The last figure in the last column on the final summary sheet, \$2,141,236.49.

Q. Will you state the total amount of rental paid by the Concrete Ship Constructors to the Defense Plant Corporation, under the terms of its lease, for the use of the facilities and machinery here involved?

A. \$2,775,807.01.

Q. And that payment was made as of what date?

A. The last payment was made on October 5, 1944.

Q. And that was in full payment of rental due under a statement from the Defense Corporation to you as of what date?

Mr. Landrum: Just a moment. That is objected to, if the court please, first, upon the ground and for the reason that there is no foundation laid; second, upon the ground and for the reason that it is rental due them for what? It doesn't say what for. And at this point, if the court please, I feel I should object to any further testimony with relation to these matters until the foundation is laid for them, that is, the contract between the Defense Plant [394] Corporation and these defendants.

The Court: I thought that was covered by the stipulation. Maybe not.

Mr. John M. Martin: No, your Honor; it is not covered by the stipulation. It is covered by the stipulation in a lump sum approximation, with the right reserved to counsel or the government to prove a larger amount. The amount recited in the stipulation is a figure of \$2,700,000,

(Testimony of Gregory Smith)

and I have attempted to show by this witness the accurate amount.

Mr. Landrum: But, if your Honor please, I think that the Tavares Construction Company and the Concrete Ship Constructors must prove their ownership. That statement is from Plancor 407. That, together with its amendments and the contract for the construction of ships, we feel should be in evidence as a foundation for this testimony.

Mr. John M. Martin: If the court please, the stipulation of facts made on the pre-trial refers to and identifies both the leases and amendments and the shipyard contracts are attached to the declaration of taking on file in the files before your Honor. I am perfectly willing to produce by this witness copies of those leases or copies of the originals for examination by government counsel, or I will offer in evidence copies, whichever he prefers. I do not think that the ship contracts as such are material in any way to the record in this case. [395]

Mr. Landrum: If your Honor please, I am very happy to accept counsel's proposition and I will make no objection if they are just copies. In so far as the ship contracts are concerned, I would like to approach the bench to state our position on that.

The Court: It is now time for the afternoon recess, and I think I will excuse the jury and take our recess now and hear you on that in the absence of the jury. Ladies and gentlemen, we will take a recess for a few minutes. Remember the admonition and please occupy the jury room.

(Thereupon, in the absence of the jury, the following proceedings were had:)

The Court: I find here this stipulation and agreed statement of facts and separate joint motions of counsel for the plaintiff and the defendant, Tavares Construction Company relative to the submission of this case.

Mr. Landrum: We have agreed that that is not to go in.

Mr. John M. Martin: No; I am not offering the stipulation as such to the jury. What I did want to do, though, to avoid that, was to offer, for the purpose of this record, certain portions of that general stipulation which we both deemed to be material, in other words, to avoid the proof.

Mr. Landrum: On the question that is now before the court, I have objected to any further testimony unless the [396] foundation is laid. I have asked that they be required to put into evidence the contract which exists and was entered into between the Defense Plant Corporation and this defendant, on and by virtue of which they are in this court.

Mr. John M. Martin: No objection to that at all.

Mr. Landrum: Together with the amendments to that.

Mr. John M. Martin: No objection to that.

Mr. Landrum: Together with the instruments referred to in that contract, namely, their contracts with the Maritime Commission for the construction of ships.

The Court: All contracts?

Mr. Landrum: I understand there are only three of them. Plancor 407 provides this lease may be terminated and canceled whenever the contract for the construction of ships with the government is finished.

Mr. John M. Martin: I have the originals here for your examination and you may read any portion of them into the record.

The Court: Why do you want to encumber the record with the whole of those contracts?

Mr. Landrum: Those contracts provide the dates on which these ships were to be delivered.

The Court: Can't you select those dates from the instruments and agree upon them?

Mr. Landrum: Oh, yes. My only thought about it was [397] this. The government's theory here may be entirely different from the defendants. We have Plancor 407 which is the real agreement, which is tied into this Maritime agreement for the construction of ships, and that they had been completed prior to December 27, 1944.

The government takes the position that has a great effect on the value of this lease.

The Court: That is an argument, isn't it, on the effect of it? What we are trying to do is to see whether there is any difference between you and what is to go into the record here.

Mr. John M. Martin: We have no objection to that.

Mr. Landrum: Counsel is willing that the original lease, Plancor 407, and all the amendments, go in.

Mr. John M. Martin: And I want the privilege of handing the jury, each one of them, a copy.

Mr. Landrum: No objection to that.

The Court: Is that what you have here?

Mr. John M. Martin: Yes, your Honor.

The Court: Then, it is agreed that the original agreement of lease, dated December 27, 1941, with the amendments thereof, known as Plancor No. 407—have you examined this?

Mr. Landrum: Yes, sir; many times.

The Court: Mr. Clerk, mark this as an exhibit, Tavares Construction Company next exhibit, whatever it will be. [398]

The Clerk: Exhibit W.

[Defendants' Exhibit W—Agreement of Lease (Plan-cor 407) between Defense Plant Corporation and Tavares Construction Co., Inc., dated December 27, 1941 and amendments thereto. This is same as Exhibit 1 attached to Amended Declaration of Taking and copied herein at pages 49 to 96.]

The Court: Exhibit W will be in evidence, then, by consent. And the record may show, also, gentlemen, that counsel for the Tavares Construction Company produced at least twelve true copies of Exhibit W and it is agreed between the parties that such copies may be delivered to the jury, for their inspection, for the purpose of facilitating following the testimony, and they are to be left in the court room as each session is concluded, and not carried away by the jurors. Is that satisfactory, gentlemen?

Mr. Landrum: Yes, your Honor.

Mr. John M. Martin: Now, if the court please, in a pre-trial conference between government counsel and myself, at which the court was not present, in an effort to avoid getting a lot of facts before this jury that we both deemed were immaterial, we both agreed that the stipulation on pre-trial in toto should not be handed to the jury; that as to the first eight paragraphs as therein stipulated to,—that those facts should in some appropriate manner be made known to the jury.

The Court: I will call your attention to these marks. They are my marks, gentlemen.

Mr. Landrum: It was stipulated between us that as to the first eight paragraphs, by someone, they should be made known to the jury. [399]

Mr. John M. Martin: Also, I believe there is another paragraph or two that I marked in your copy, that I can identify, that was, likewise, to be made known to the jury.

The Court: That is just a historical statement.

Mr. Landrum: That is all, your Honor.

Mr. John M. Martin: I wanted paragraphs numbered 26 and 27 made definite as to the dollar figure and I wanted paragraph No. 29 made known to the jury.

The Court: Is there any objection to that?

Mr. Landrum: He has already proved Nos. 26 and 27 by this witness, but I have no objection at all to it, and I am perfectly satisfied that they put in No. 29, your Honor.

The Court: 26, 27 and 29?

Mr. John M. Martin: Yes, your Honor.

Mr. Landrum: That recites the consideration that they paid for this lease and option.

The Court: Very well, if it is agreeable.

Mr. Landrum: Could I read No. 29 again, your Honor? That is perfectly all right. That is the truth.

Mr. John M. Martin: Bearing upon paragraph 29, I intend to offer proof as to the consideration with which we parted, in other words, as to the fair value of that supervisory fee. Normally, that would have nothing to do with the normal measure of compensation. It has nothing to do with the market value but I am taking the position that, where the [400] United States Government has granted by contract, to my client, certain rights, and then has seen fit, by eminent domain, to acquire from my clients those rights, then the very minimum they

should recover would be the consideration with which they parted. Otherwise, I would have filed suit in the United States Court of Claims for just compensation for the consideration we had in that property. Where the government sees fit to file an action in eminent domain, that one element of compensation to be considered is the right, the chose in action, the right of my client to sue the government in the Court of Claims, and of which right my client is thereby deprived. We no longer have any right to sue in the United States Court of Claims because of the declaration of taking and because of the eminent domain proceedings following the declaration of taking.

Had they not brought this action, my remedy then would have been in the United States Court of Claims and they would have applied the rule of just compensation. I do not see how they can reduce the just compensation or deprive me of that as an element of compensation merely by selecting this as a forum in eminent domain and condemning it.

Mr. Landrum: I don't understand counsel's idea at all.

The Court: What has the jury to do with that problem?

Mr. John M. Martin: They have only this to do. That very right that my client had under this contract has been [401] acquired by the government. One of the rights it would have had, had it not been for this declaration and by the filing of this suit in eminent domain subsequent to the declaration of taking, would have been to have filed suit in the Court of Claims to recover back the fair value of the consideration with which it parted. That consideration here was, first, an assignment, at an acquisition cost of \$1 to the United States, of the original 20-year leasehold estate that we held at National City. We parted with that. These lease agreements so show. The

other consideration would be the fair value of our supervisory service. We went to work down there and constructed those facilities. The government comes in and takes it away from us by condemnation and it acquires a contract which would have been the contract upon which I would have brought my action in the Court of Claims.

We no longer can sue in the Court of Claims for that reason. If your Honor doesn't feel that that is true, then I want this record made with a ruling so that, when I am through here, I can go to the United States Court of Claims.

Mr. Landrum: If the court please, the government has not raised the question of jurisdiction. I understood that what was before the court was simply this, that he wished to prove paragraph 29, or whatever it is, to this jury.

Mr. John M. Martin: That is right, and, in addition, to [402] prove the fair value of the supervisory fee there referred to.

Mr. Landrum: I am not objecting to that. I was going to try to prove it myself.

The Court: Are you together now?

Mr. Landrum: I have been hoping he would do that. I am not going to object to him putting in testimony with relation of how much would be a fair fee for the supervision.

Mr. John M. Martin: Plus the fact as to what the jury has to do with that. If I am strictly limited to the normal rule of eminent domain, then I am limited to the fair market value of my leasehold estate.

The Court: We will cross that bridge when we come to it. I haven't had from any of you yet your requested instructions, and I want them when we recess tomorrow night, at least.

Mr. Landrum: You will have mine tomorrow morning.

The Court: What I want to know is whether you gentlemen are together on the factual presentation of what you want to present to the jury.

Mr. Landrum: No, your Honor. We seem very far apart. I can't get counsel's theory. If it is that he is entitled to claim some compensation from the government of the United States in a condemnation case for the reason it took away from him his right in the Court of Claims— [403]

The Court: There are, of course, certain rights terminated by eminent domain proceedings. Sometimes those rights are such as, in the absence of the sovereign power, would not be considered just.

Mr. Landrum: He certainly is not going to try a case before the Court of Claims and this jury, too.

Mr. John M. Martin: I am of the opinion that you have raised the jurisdiction again on me. If the court can accord me the same right as in the Court of Claims—

The Court: You need not have any fear but what the court, in so far as it can, will permit the jury to find just compensation for the taking which the government has accomplished.

Mr. John M. Martin: Then I don't need a requested instruction.

Mr. Landrum: I will say this, and I say it advisedly, that there are a good many more instruments of this kind. There are a lot of instruments that were signed up long after this case was brought. If counsel is going to be permitted, and I know he is not, to go and talk about the right to sue in the Court of Claims.—

The Court: No; he wouldn't be permitted to discuss that. The court has stated that, as a matter of law, with-

(Testimony of Gregory Smith)

out indicating anything further at this time, the case will be submitted to the jury upon the theory that the jury shall fix [404] just compensation for the taking that has been accomplished by the government at the time applicable to the case.

Mr. Landrum: May we have a little further recess, your Honor?

The Court: Yes.

(A short recess was taken.)

The Court: All present. Proceed.

Mr. John M. Martin: If the court please, I would like to have the last question to the witness read.

The Court: Very well.

(The question was read.)

The Court: You had better read back a little bit to give the context.

(The record was read by the reporter.)

Q. By Mr. John M. Martin: You may answer.

A. July 10, 1944, with interest to August 1, 1944.

Q. Is that the last statement for rentals ever received by the Concrete Ship Constructors from the government?

A. Yes, sir; it is.

Mr. John M. Martin: You may cross-examine.

Cross Examination

By Mr. Landrum:

Q. Mr. Smith, taking up that last question, did I understand you to say that, under date of October 5, 1944, the Concrete Ship Constructors made the last payment of [405] rents which was due under and by virtue of the original agreement between the Tavares Construc-

(Testimony of Gregory Smith)

tion Company and the Defense Plant Corporation in connection with this yard? A. That is correct, sir.

Q. Mr. Smith, isn't it a fact that this exhibit contains, within itself, a clause to the effect that this yard may be used by the Concrete Ship Constructors for the construction or for the repair work of boats and things for private individuals, provided they receive the consent of the Defense Plant Corporation?

A. I don't believe the contract calls for that.

Q. I don't want to take up time, but I can call your attention, I think, to paragraph 22.

Mr. Landrum: As I understand it, your Honor, this Exhibit W is in evidence.

The Court: That is true.

Q. By Mr. Landrum: Mr. Smith, calling your attention to paragraph 22 of Exhibit W, do you have a copy of it? A. No, sir.

Mr. John M. Martin: Here is one.

Mr. Landrum: I understood, your Honor, that these copies were to be also given to the jury and they might have permission to have a copy of the contract.

The Court: That was the understanding; yes. The same thing is true with these copies, ladies and gentlemen. [406] They are for your use in the court room and later on in the jury room when you deliberate, but you are not to take them from the court house during the progress of this case, and at each adjournment you will leave with the clerk, so that they will be available to you the following day. And the record may show that each juror now has a copy, I presume, of Exhibit W. Now, each juror has a copy.

(Testimony of Gregory Smith)

Q. By Mr. Landrum: Mr. Smith, calling your attention to paragraph 22 of Exhibit W, which is in evidence, in this case, it reads, "Twenty-two: Lessee may use such site, facilities, and machinery only for the construction by lessee of boats for sale to the government, unless otherwise permitted in writing, by Defense Corporation, with the consent of the Maritime Commission noted thereon. Lessee also agrees that so long as this lease or extension thereof remains in effect it will eliminate all charges (including all charges for amortization and depreciation), exclusive of the rental, maintenance, taxes and insurance provided for herein and ordinary operating expenses, for the site, facilities and the machinery to be provided hereunder, from any price charged the government." Have you read that? A. No, sir.

Q. Isn't it a fact that the Concrete Ship Constructors did, pursuant to that clause 22 of that contract, request permission of the Defense Plant Corporation to use these [407] facilities for the construction by or for operation of private individuals? A. Yes, sir.

Q. That is right, isn't it? A. Yes, sir.

Mr. John M. Martin: If the court please, I object to this line of questioning unless it be confined to the period prior to the declaration of taking, December 23, 1944. Manifestly, the lease ceased to exist on that date, as a matter of law, and I would like for this line of questioning to either be confined to the period ahead of the taking by the government or that I be given an opportunity to separately object to it.

The Court: I think, where you have gone into that phase of the case in the direct examination, the government should be permitted to explore it so that the jury

(Testimony of Gregory Smith)

will have the whole picture before it, as to what the financial settlements and transactions were pursuant thereto.

Mr. John M. Martin: I, if the court please, limited my examination to prior to December 23, 1944. I stopped at that date.

The Court: The objection is overruled.

Q. By Mr. Landrum: I understood you, Mr. Smith, in response to my question, to say that your company had made such a request. [408]

A. Yes, sir; it has.

Q. Can you tell us when they made it?

A. I don't recall.

Q. If I would call your attention to about the month of October, 1944 — well, no; February, 1945 — state whether or not your company did not apply to the Los Angeles agent of the Reconstruction Finance Corporation for the use of these facilities, for the repair of ships, for parties other than the government, and request the consent of the Maritime Commission.

Mr. John M. Martin: To which I object, if the court please, on the ground it is immaterial to any issue in this case and not a matter of proper cross examination, as counsel on direct examination confined his testimony to a date prior to the taking.

The Court: It may be a matter of defense strictly instead of cross examination. I think perhaps it is.

Mr. Landrum: Could I approach the bench, your Honor?

The Court: No; I don't think it is necessary to approach the bench. I am not foreclosing the government from showing what money, if any, was paid to the defendant in this case.

(Testimony of Gregory Smith)

Mr. Landrum: Your Honor, might I be permitted to state my position? I don't want to argue the matter. This witness was asked whether or not he had received a final statement of rent, all of the rent that they owed the government. That [409] is the question counsel put to him and he said yes. We had better have the record read if there is confusion as between counsel as to what period was covered in your question. I understand you to assert, Mr. Martin, that you limited your inquiry to the period up to the time of the declaration of taking.

Mr. John M. Martin: And, also, I limited it to the payment of rental under this Plancor 407 and, also, of payments under the lease. I did not go into any detrimental arrangement that might exist in this matter.

The Court: We will have to have the record read on that if you are not together on the question.

Mr. Martin: I would like to ask the witness whether the figures he gave as to the amount of rentals were limited to Plancor 407.

Mr. Landrum: Oh, no.—

The Court: We must control the case in an orderly fashion. I will have to have that record read. You may pass on to some other phase of the examination. I am frank to say I haven't any independent recollection as to whether counsel did confine his questions on that phase of the inquiry to a period up to the time of the declaration of taking. If he did not, you are correct, but, if he did, you are incorrect.

Mr. Landrum: Your Honor, I will defer it until such time as we may have the record read. [410]

Mr. John M. Martin: I would like, on redirect examination, to ask one question—

(Testimony of Gregory Smith)

Mr. Landrum: Just a moment. I am not through cross-examining this witness.

Mr. John M. Martin: Oh, pardon me.

Q. By Mr. Landrum: Mr. Smith, you were the gentleman who did the work or the majority of the work in the preparation for use of this tabulation which shows the depreciated value of the facilities here, were you not?

A. Yes, sir.

Q. Now, I think, in order that the jury may more definitely understand just what this is, I will ask you what did you use as a basis for the tabulation which is in the jury's hands. What did you get it from?

A. From the Assets Property Records.

Q. When you say the Assets Property Records, Mr. Smith, what you really mean is that you took this from the invoices which covered the facilities and the property and things which were made to the Tavares Construction Company? That is right, isn't it?

A. That is what the property records were made up from.

Q. In other words, you had what we call invoices for each article that you have here, didn't you?

A. Yes, sir.

Q. And that money was paid out by whom? [411]

A. Paid out by the Defense Plant Corporation.

Q. That is right; by the Defense Plant Corporation. In other words, will you tell us, just briefly, how that transaction went?

A. Apparently there was a lot of paper work.

Q. The invoices are about that high, aren't they? Indicating about six inches?

(Testimony of Gregory Smith)

A. That is right. The purchases were approved by the Defense Plant Corporation representatives. The copies were audited by their auditors and then we presented to the Defense Plant Corporation the certificate for payment directly to the vendor, or, in the case of those items which we had disbursed ourselves, like pay rolls, for reimbursement to ourselves.

Q. And then the Defense Plant Corporation would pay out the money? A. Yes, sir.

Q. The total amount, as exhibited by this exhibit, that the Defense Plant Corporation paid for the construction of this shipyard, was \$2,047,067.95? That is your total, isn't it? A. Yes, sir.

Q. Taking this exhibit which the jury has, the property record, plus schedule 1-A, page 1101, now that 1101 is actually the number of the invoice, isn't it? [412]

A. No.

Q. What is it?

A. That is the page of the Assets Property Record.

Q. And that was made from the invoices and made up of several charges that comprised the item. And what does "1-A" mean?

A. That is the schedule of factual appendix A, which was also prepared by the Defense Plant Corporation.

Q. That "1-A"—does that tie back into the contract, Plancor 407?

A. 1 and 2 form one schedule under Plancor 407.

Q. What I am trying to get at is what you did here was to take the contract Plancor 407 and take those records and then figure the depreciation in accordance with the contract, didn't you? A. Yes, sir.

(Testimony of Gregory Smith)

The Court: In accordance with the formula set up in the contract.

Mr. Landrum: Yes, sir; all right.

The Court: There are two methods there?

The Witness: Yes, sir.

The Court: And these two methods correspond to 1 and 2 of this exhibit?

The Witness: No, sir.

1 is the first item and Formula B of the contract. [413] This is all under Formula B.

Q. By Mr. Landrum: The contract, in paragraph 15, Plancor 407, which is in evidence in this case, provides the foundation and the method for your depreciation which you figured on here, doesn't it?

A. That is right, sir.

The Court: And you have only taken one of those formulas there?

Mr. Landrum: If your Honor please, it is B because A won't apply. We have agreed on that.

Mr. John M. Martin: If the court please, I haven't agreed that Formula A is not applicable.

The Court: In any event, it is Formula B which the computation was made upon?

The Witness: Yes, sir.

Mr. John M. Martin: That is correct.

The Court: And not Formula A?

The Witness: That is right.

Mr. Landrum: The computation A was made as though they would exercise the option under Formula B.

Q. Now, Mr. Smith, I notice in that exhibit that there is a charge. You call it pro rata of service costs—

(Testimony of Gregory Smith)

Mr. Crouch: If I may be permitted to suggest, I think counsel and the court and the jury can follow the matter if he will indicate the page he refers to. [414]

Mr. Landrum: It is on the last page—well, no—next to the last page.

Mr. Crouch: The exhibit is paged.

Mr. Landrum: Down in the bottom there it says, "2501-2, pro rata of service costs."

Mr. Crouch: On what page?

Mr. Landrum: Next to the last page.

Q. Now, will you tell us how much the total service cost charges here were?

A. It is shown under the grand totals on the summary sheet, sir.

Q. How much is it? A. \$235,662.26.

Q. \$235,662.26? A. Yes, sir.

Q. What are service costs?

A. In this particular case the service costs were the engineering, the accounting that was necessary for the project, the pay roll, taxes, social security, and compensation insurance and clerical costs.

Q. Now, within those service costs I call your attention to what we know as item 2, 23(c). Do you need this paper? A. It might be helpful.

The Court: What is the paper you refer to?

Mr. Landrum: It is a memorandum he made himself, your [415] Honor.

The Court: It hasn't been offered in evidence, has it?

Mr. Landrum: No. I don't intend to offer it. What my concern is with is item 3, 23(c), \$8,595.52.

Q. That is not shown on this record that the jury has, is it? A. No.

(Testimony of Gregory Smith)

Q. But within those service costs are included \$8,595.-52. Now, you tell us what that was for.

A. I gave you a memorandum on it, but I will tell you.

Mr. Landrum: I have the paper that will answer that, your Honor.

A. That portion of the management's salaries that were applicable to the construction and acquisition of these facilities.

Q. \$8,595 for somebody's salaries. Whose salaries?

A. The managers.

Q. Who were the managers?

A. Mr. Tavares, Mr. Seabrook and a portion of my salary is included in there. Incidentally, there is a credit of \$1275.10 which was charged back against that, which is also on the Property Assets Record.

Q. Do you mean to say there should be twelve hundred and some odd dollars deducted from the salaries which were paid? A. That would probably be the case. [416]

Q. Would you be good enough to figure this so that we can get the figures accurately?

A. On the back of page 2501 on the Assets-Property Record is a credit for readjustment of managers' salaries.

Q. Then tell us when you make that adjustment, Mr. Smith, how much is included in that 2501-2 for salaries paid to the officers of the Concrete Ship Constructors in connection with this building of this shipyard?

A. The difference between those two amounts.

Q. Will you figure it for me, please?

A. \$6,869.82.

(Testimony of Gregory Smith)

Q. Who paid them?

A. The Defense Plant Corporation paid all their salaries.

Q. Now, I want to call your attention to item 9(23m) in the sum of \$1,380.55, which has been included in this tabulation which we have made. Can you tell us what that \$1300 which the Defense Plant Corporation paid was for? A. \$1,380?

Q. Yes, whatever it is, please, sir.

A. That is for vacation and holiday pay.

Q. For whom? A. For the clerical employees.

Q. That did not include Mr. Tavares and you?

A. No. sir. [417]

Q. All right. Now, I will have to come back up here because we have only one paper. Calling your attention to a charge for engineering, that is item 4(36A), \$26,-834.57, who did the engineering?

A. Which item is this?

Q. That item for engineering, please.

A. \$26,834?

Q. Yes, sir.

A. Well, my answer to you on this-memorandum is our own construction naval architects and structural engineering department's salaries.

Q. It is the salaries in the engineering departments of the Concrete Ship Constructors?

A. That's right, sir.

Q. Now, there is one further item, item 6(23B) on the records, \$9,433.64 for purchasing. Now, what does that mean? A. Our purchasing department.

(Testimony of Gregory Smith)

Q. Your purchasing department. In other words, that was the salaries of the purchasing department of the Concrete Ship Constructors?

A. That portion—that was applicable to the purchase of items for the Plancor 407.

Mr. Landrum: Now, if your Honor please, with the exception of the matter which we left undeveloped, that is all I [418] have from this witness at this time.

Mr. John M. Martin: I would like to ask him a few questions on redirect.

The Court: Yes.

Redirect Examination

By Mr. John M. Martin:

Q. Mr. Smith, were all the items about which counsel has just cross-examined you included in the amounts which the Concrete Ship Constructors were to repay to the Defense Corporation as rental?

A. Will you reword that, please?

Mr. John M. Martin: Read the question, please.

(The question was read.)

The Witness: Yes, they were.

Q. By Mr. John M. Martin: And what was the total amount of the rental repaid prior to December 23, 1944?

Mr. Landrum: Your Honor please, that is repetition. We already have it in.

The Court: I think so. That is, we are still uncertain, all of us, as to whether it was tied definitely to that date.

Mr. Landrum: I am perfectly willing to stipulate, for the purpose of the record, that the last payment which was made of rentals under that contract to be paid out of the

(Testimony of Gregory Smith)

construction of ships was made on the 5th day of October, 1944. [419]

The Court: But the question was not limited to the construction of ships. Was it, Mr. Martin?

Mr. John M. Martin: I intended to limit it to Plancor 407, which is our Exhibit W, and also to payments made prior to December 23rd, 1944.

Mr. Landrum: I don't know, if your Honor please, what counsel's purpose is, but your Honor will recall that your Honor wished to have that record read.

The Court: I still desire to have it read because you are not together.

Mr. John M. Martin: If I have misunderstood the figure which the witness gave, or just so I may understand it, I desire at this time to prove the total amount of rentals actually repaid under this agreement, Exhibit W, prior to December 23, 1944.

Mr. Landrum: We won't have any argument about that. He has given the figure.

Mr. John M. Martin: He can give it again.

The Witness: \$2,775,807.01.

Mr. Landrum: That is already in.

Mr. John M. Martin: That is all.

Mr. Landrum: Now, if your Honor please, I said on this other matter—

The Court: Yes, we will have to clarify the other situation. [420]

Mr. Landrum: Then I have no further questions of the witness at this time.

(Testimony of Gregory Smith)

The Court: Have you some other questions, Mr. Martin?

Mr. John M. Martin: Oh, I have some more questions, if the court please.

Q. By Mr. John M. Martin: Mr. Smith, how many ships was Concrete Ship Constructors to build in all?

Mr. Landrum: That is objected to, if the court please, upon the ground and for the reason that it is not the best evidence.

The Court: Sustained.

Mr. John M. Martin: I withdraw the question.

Q. By Mr. John M. Martin: Mr. Smith, when was the last ship delivered to the Maritime Commission, actually finished and ready for delivery?

A. May 14, 1945.

Q. As of December 23, 1944, how many ships remained to be finished?

A. Two ships; two repair ships.

Q. On what date were they actually completed?

Mr. Landrum: If the court please, I am going to object upon the ground and for the reason that it isn't the best evidence. We have the original contracts for the construction of those ships with the Maritime Commission right here.

The Court: That is true. It is not the best evidence, [421] and in orderly procedure the writing ought to be produced. I don't see why you cannot agree upon a matter of that kind.

(Testimony of Gregory Smith)

Mr. John M. Martin: The matter I am asking, if the court please, is not set forth in the contract. There was an estimated date of completion set forth in the contract, and I am inquiring of the witness only as to the actual date of the completion.

The Court: There must be a memorial as to the actual date of completion. I apprehend there would not be a contract with such inexactitude that they would not have a memorialization showing the steps which had to be taken during its performance.

Q. By Mr. John M. Martin: Is there any record, Mr. Smith, to your knowledge, showing a memorial on the part of the contracting parties, and by that I mean between the government or the Maritime Commission and Concrete Ship Constructors, setting forth the actual date of the actual completion of the last ship?

A. We have the receipt by the government of the delivery of the last ship.

Q. Do you have that with you?

A. No, sir, I do not.

Q. Will you endeavor to produce it so that we will have it in the morning? A. Be glad to. [422]

Q. Can you tell me the approximate state of completion of these last two ships as of December 23, 1944?

A. I could not.

Mr. John M. Martin: That is all.

The Court: Is that all?

Mr. Landrum: I would like to ask him one or two more questions.

(Testimony of Gregory Smith)

Recross Examination

By Mr. Landrum:

Q. How many contracts did the Concrete Ship Constructors have with the Maritime Commission for the construction of ships? A. Five.

Q. And the first four of those contracts, had they been fully completed on December 23, 1944?

Mr. John M. Martin: To which I now object, the same objection counsel made me. We will shorten this case, if we can, apart from technical proof, and I am willing to stipulate that the witness may testify as to the actual date of completion of any ship built by my clients.

The Court: Of course, the ruling would work as to both sides.

Mr. John M. Martin: That is right.

The Court: And it does work both ways, and your objection is sustained. [423]

Q. By Mr. Landrum: Then one further question. I understood you to say, Mr. Smith, that on December 23, 1944, there were only two ships yet to be delivered.

A. That is correct, sir.

Mr. Landrum: I believe that is all.

The Court: Have you some other witness that you can use now?

Mr. John M. Martin: Yes. I am ready to proceed.

(Witness excused.)

Mr. John M. Martin: I will call Mr. Tavares.

CARLOS TAVARES

called as a witness by and on behalf of the defendant
Concrete Ship Constructors, having been first duly sworn,
was examined and testified as follows:

Direct Examination

The Clerk: Will you state your name, please?

The Witness: Carlos Tavares.

By Mr. John M. Martin:

Q. Where do you reside, Mr. Tavares?

A. La Jolla.

Q. Where were you born?

A. I was born in Shanghai, China.

Q. When? A. In 1905.

Q. How long did you live in China? [424]

A. I lived there until 1924.

Q. And of what nationality?

A. Portuguese.

Q. Portuguese. When did you first come to America?

A. When I came here to school.

Q. When was that? A. In 1924.

Q. And what school did you attend?

Mr. Crouch: Will the witness speak a little louder,
please? We can't hear over here.

The Court: Yes, will you raise your voice a little?

The Witness: University of Notre Dame.

Q. By Mr. John M. Martin: Do you hold any
degree? A. Yes.

(Testimony of Carlos Tavares)

Q. What?

A. Bachelor of Science, Civil Engineering.

Q. From what school?

A. From that same school.

Mr. Crouch: We still can't hear him.

The Witness: From that same school.

The Court: This is a hard room in which to hear, and it is no reflection on any witness to have that said, but if you can keep your voice up as much as possible, it will help.

The Witness: All right. I will. [425]

Q. By Mr. John M. Martin: You received that degree in Civil Engineering from Notre Dame in what year?

A. The class of 1927.

Q. Will you just briefly relate what your business activities were subsequent to that date?

A. I returned to Shanghai and joined a firm of engineers as a draftsman at \$120 a month. In about a year I was made assistant engineer and I ran the show. I became a partner there, a junior partner, and my duties consisted in designing and contracting. We did a lot of work. We designed rabbit filters, sedimentation tanks, water works, concrete, reinforced concrete buildings.

I severed my connection after working for about two years with this firm and went to Hong Kong to investigate the new type of piling that was being used at that time. I came back to Shanghai and started the Shanghai Vibro Piling Company, and was made manager of it at a salary of \$1500—

(Testimony of Carlos Tavares)

Mr. Landrum: Just a moment; if the court please, I don't think it is necessary for him to recite his income.

The Court: I don't believe it is. That is not always the proper estimate of qualifications.

Q. By Mr. John M. Martin: Well, in any event, it is an issue which is not material here, and he was probably paid the salary, and if not, we are not able to collect it now. So if you will skip the salary and boil it down to the [426] important things, showing your training and experience leading up to the ship construction.

A. I stayed with this company for about two years, when I joined another company and was made a junior partner of it. When I was with that company we did an awful lot of heavy construction work.

Q. What was the name of that company?

A. A. Corritt Company.

Q. And where was its principal place of business?

A. Its principal place of business was in Shanghai.

Q. That was during what period?

A. That was during 1932 and to 1937. During that time we were both contractors and engineers. We designed piers for the Standard Oil Company, the Shell Oil Company, Jardine along the Bund in Shanghai. We designed a dry dock for the Kiang Nan dock. We did an awful lot of work. We built some piers in Tsing Tau. We built the Shung-Tang bridge, which is the largest bridge in China. We designed and built it. We specialized in foundation work of all types, particularly under-

(Testimony of Carlos Tavares)

water work. We drove the longest pile in the world. We drove the deepest pile under compressed air, 126 feet below water, and while we were finishing and completing that job in 1937, we were bombed by the Japs, and we completed the job. I came to Los Angeles for a holiday in 1937, and I tried to look for some work, and I [427] couldn't find any. So I started my own company, and I found a job in Long Beach of the Ford Motor Company that was deteriorating, all the piles were going to rot, so I thought that would be a pretty good job for me to tackle. I didn't have an awful lot of money at that time, but I managed to borrow, and had about, probably—

Mr. Landrum: Just a moment.

Q. By Mr. John M. Martin: Leave out the dollars, please. A. All right. I will leave that out.

Mr. John M. Martin: A lot of us were hard up in those times.

The Court: I think we had better suspend with that.

Mr. John M. Martin: Yes.

The Court: Now, ladies and gentlemen, if you will leave those papers here during the recess and you will get them back tomorrow morning.

We will take a recess until half past nine in the morning, and, ladies and gentlemen, remember the admonition.

(Whereupon, at 4:40 o'clock p. m., Wednesday, February 19, 1947, an adjournment was taken until 9:30 o'clock a. m., Thursday, February 20, 1947.) [428]

San Diego, California, Thursday, February 20, 1947,
9:30 A. M.

CARLOS TAVARES

the witness on the stand at the time of adjournment, having been previously duly sworn, was examined and testified further as follows:

Direct Examination (Resumed)

By Mr. John M. Martin:

The Court: All present. Proceed.

Mr. Landrum: If the court please, might we approach the bench for a moment?

The Court: Yes. The answer of the defendant Leonard McLaughlin may be filed as of this date.

(The following proceedings were had without the hearing of the jury:)

Mr. John M. Martin: If the court please, it is on page 394 the question starts and page 405.

Mr. Landrum: I think so, your Honor. I haven't read the record but Mr. Martin showed it to me this morning and I think he is correct.

The Court: If you want to make a statement to the jury, you may do so.

Mr. John M. Martin: In the stipulation we agreed upon yesterday, by which the stipulation of counsel on the pretrial would not all go to the jury as such, I eliminated [430] everything in the way of correspondence or factual data occurring subsequent to December 23, 1944. I do not deem it material to the issues of this case to receive evidence of any dealings my client had with any department of the government relative to the use of this property subsequent to the date that this ceased to exist. It

was for that reason that I agreed to exclude all of the correspondence in our stipulation and all of the factual statements of matters that had occurred subsequent to December 23, 1944. Now, if counsel for the government should be permitted to open that up and put on factual proof of what transpired subsequent to December 23, 1944, then I will have to offer that stipulation myself to prove those facts.

Mr. Landrum: That is not what counsel for the government proposes to do but, if they come in here and make certain assertions, for instance, that they had a right to use that yard for private enterprise, without payment of rent—

Mr. John M. Martin: There is no such assertion.

Mr. Landrum: Well, it was made in the opening statement by Mr. Martin and it is shot all through this case. If they make any such claim as that, we are entitled to show, as an admission against interest and in rebuttal of that statement, that they did agree to pay a certain amount. If they come in here and say, "In my opinion, this is worth \$3,000,000," and I take this witness and say, "Mr. Tavares, did you know [431] that day before yesterday it was testified it was worth \$3,000," I think that it is proper as an admission against interest.

Mr. John M. Martin: I am making no such statement.

The Court: Where was his statement? I don't remember what he said.

Mr. Landrum: They made the statement and they claimed during the trial of this case that they had the right to use this yard without payment of rent.

Mr. John M. Martin: Oh, no.

Mr. Landrum: You tried to show you had a lease there without payment of rent, and that is not true.

Mr. John M. Martin: If the court please, at no time have we contended nor do we now contend that we had any right to the free rent use of any part or portion of this yard, its facilities or machinery, for any purposes other than ship work for the United States government.

Mr. Landrum: Here is another angle to the case, if your Honor please,—

The Court: Why can't you dispose of that matter by a concession in the presence of the jury?

Mr. Landrum: I am perfectly willing to do that but I think it would be material—if your Honor please, the thing we are concerned with here is the valuation of that leasehold interest. If they contend for a lease, the value [432] of that lease is dependent upon how much it costs them to stay in that shipyard. They have expenditures for insurance, for taxes, for guards, and all of those things. Now, if they contend that that leasehold has a value, what it will cost them to have that leasehold is admissible as going to the question of its value. We propose to show that they did have those expenses and that they even asked the government to pay a part of them.

The Court: I think you are unnecessarily complicating the problem. The law of the case has been established as to the right to compensation for the leasehold. It is the option feature, of course, that is the only complex situation in the case. Otherwise, the General Motors principle and the principle laid down in the other cases that have followed the General Motors case are clearly determinative of the leasehold question, and that is going to be followed in this case. We are not going to overrule the principle of the General Motors decision for the injury that the lessee is put to by reason of the lawful termination of this lease.

When it comes to the question of value of the option, it seems to me that the case can be simplified by the optionee preserving in the Court of Claims anything subsequent to the date of the termination of the project.

Mr. John M. Martin: Our theory is that there is a dead-[433] line, that there was a deadline, of December 23, 1944, the date when the government took, by operation of law, our leasehold estate, and as to this lawsuit I am limited to the market value of that.

If, by virtue of some other contract with the government, they have agreed with me that I possess certain other rights covering the period subsequent to December 23, 1944, such rights are not involved.

The Court: Do you take any different position?

Mr. Landrum: No, your Honor. My position is simply this, that it is true that we are fixing the just compensation as of December 23, 1944, for the taking of this lease (coupled with an option), but I contend that the question of how much that is worth is what is before this jury now. If I could say to the witness, "Mr. Witness, in case you did retain that lease that you are claiming was valuable, how much would you have to pay out in costs—"

The Court: That is all within the terms of the date of fixation.

Mr. John M. Martin: That is right, and I have no objection to that line. That was all I was asking for. I asked him if it wasn't a fact they had to pay rental at the rate of 10 cents—

The Court: Anything that comes within the period up to December 23, 1944, is a relevant matter to this case. Any-[434] thing that occurred subsequent to that is not relevant in this case. I am not saying that there may not arise in some other forum a claim for structure breaches and so forth, for damages of that kind.

Mr. Landrum: I am afraid I am not getting my point over to you. I am sorry. To boil it down, it is simply this, your Honor. If they are in this case contending that they had the right to stay there, the right to possession under that leasehold, I am entitled to show how much that right of possession would have cost.

Mr. John M. Martin: We do not contend we had a right to stay there after it was condemned.

The Court: How could they contend that they had a right to stay there after the government terminated the contract?

Mr. Landrum: No, your Honor; I am not saying it that way. That isn't what I say. In arriving at the value of this lease, counsel said in his opening statement that they had a lease under which they could stay there until 1949.

Mr. John M. Martin: We couldn't once the government terminated it.

The Court: That was a pure prospective eventuality and that prospective eventuality was terminated by the government.

Mr. Landrum: And the question is how much have they lost by reason of our termination of it. And what they lost must be determined by what it would cost to keep it. [435]

Mr. John M. Martin: There is no objection to that.

The Court: You don't seem to be at variance on that.

Mr. John M. Martin: Your Honor, I am in rather a peculiar situation. My position here is that my client has another agreement, that is not involved, dated August 9, 1945, by which the Maritime Commission has agreed that, for instance, my attorney's fees are an item of expense.

The Court: Of course, you can't determine those here.

Mr. John M. Martin: No; I don't want to do it and I don't want it before the jury. But, if counsel for the government starts to go into all of the contracts my client has entered into since December 23rd—

The Court: He says he is not going to do that and, if he attempts to do so, he will not be permitted to do it.

Mr. John M. Martin: I want a separate right to go to the Court of Claims—

The Court: I have been trying, as far as we can, to keep this case separate and apart from any additional claim that the defendants may have against the government, which is litigable in the Court of Claims, and we will do that by adhering to that deadline of December 23, 1944. Anything that occurred subsequent to that is irrelevant to this issue unless the defendants bring it in themselves, and, if they do, then you have a right to respond to it.

Mr. Landrum: Could I ask your Honor this? I trust that [436] your Honor will indicate whether you think it is correct or not. It is, if the question is the value of that leasehold interest, then may I not be permitted to show how much it would cost them?

The Court: I don't know what you will be permitted to show. I think I know the rule established by those cases which were mentioned.

Mr. Landrum: I am very familiar with the *Petty Motors* and the *General Motors* cases.

The Court: Then, why don't you follow the doctrine of those cases? I am not going to overrule the Supreme Court. They fix the rule pretty strictly here. Let's follow the Supreme Court. [437]

(Thereupon the proceedings were resumed within the presence and hearing of the jury:)

Mr. Landrum: If your Honor please, for the purpose of the record, I desire to withdraw the question which I asked the witness who was then on the witness stand, and with relation to which your Honor was going to look into the record.

Mr. John M. Martin: Mr. Tavares, please.

CARLOS TAVARES,

called as a witness by and on behalf of Defendant Concrete Ship Constructors, having been previously sworn, resumed the stand and testified further as follows:

Direct Examination (Continued)

By Mr. John M. Martin:

Q. As I recall, Mr. Tavares, when we adjourned yesterday you had been engaged in an attempt to briefly state the experiences that you had prior to the occurrence of the facts involved in this case that bore upon your educational or technical qualifications in connection with ship construction. Will you begin where you left off, as nearly as you can, and briefly finish your statement?

A. I was building the Ford job at that time, wasn't I?

Well, I got this contract from the Ford Motor Company.

The Court: Raise your voice, please, Mr. Tavares, or they will not be able to hear you. [438]

The Witness: I got this contract from the Ford Motor Company to undertake the rebuilding of their dock in Long Beach. This contract was awarded me. While I was not the low bidder, they awarded this contract to me.

(Testimony of Carlos Tavares)

Mr. Landrum: Just a moment. If the court please, I hardly think that is proper. It is argumentative.

The Court: It sounds as though it might be.

Q. By Mr. John M. Martin: We do not want any argument, or anything except those things you know of your own knowledge, Mr. Tavares. The reason that may have prompted the Ford Motor Company to have awarded you the contract is not here material. You will simply state the nature of the work and any special features of it which you think may have entered into your qualifications for your subsequent ship construction work and the construction of these facilities. By the way, what do you mean when you say "facilities"?

A. The facilities in the shipyard.

Q. Yes. What portion of it is correctly referred to? What do you refer to as facilities?

A. The facilities and machinery in the shipyard are everything that you see on that model that is necessary to build ships with.

Q. You mean it includes all types of equipment and machinery used in ship construction?

A. That is right. [439]

Q. It does not include the site itself, as we use the term? A. No.

Q. Now, what type of work was this Ford contract?

A. It was repairing and replacing the piles under water, the jacking up of certain portions of the building that had settled and—

Q. Did it require any particular engineering skill, in your judgment? A. Yes, it did. It required—

(Testimony of Carlos Tavares)

Q. What?

A. Well, it was a job that was never done before, and the methods which were used were very novel; and it is too long to go into, to explain what that was, but I can assure you it was.

Q. Very well. Let's pass to the next work that you performed, that you take into consideration in the statement of your experience and qualifications.

A. Well, the next job I performed was raising the Bridge of the Gods, which was the second largest single span, and is over the or right close to Barnevale Dam over the Columbia River. It was a 1500-foot-long bridge, which had to be raised 45 feet in the air. That was a job that only three—or, four contracting firms were qualified to bid on. I happened to be one of them. [440]

Q. Was it more or less difficult from an engineering standpoint than the General Motors job you referred to—I mean, the Ford Motor job you referred to?

A. There is no difficult engineering job if you work at it and know your job.

Q. What did you then do, following the raising of the bridge?

A. I then lowered the locks at Salido up near the Dalles, which was another difficult engineering job.

Q. That is on what river, and where?

A. That is on the Columbia River in Washington—in Oregon.

Q. Were there any other major construction jobs that you care to mention?

A. Oh, there are lots of them. I think it will take a long time to mention them here.

(Testimony of Carlos Tavares)

Q. Very well. Are you a citizen of this country?

A. Yes, sir.

Q. When were you naturalized?

A. I applied for my citizenship as soon as I came over, and I finally got my papers in 1941.

Q. You are an American citizen now?

A. Yes, sir.

Q. Now, will you briefly state what, if any, investigation you made as to the availability or suitability of [441] shipyard sites for the construction of facilities and machinery for ship construction for the government, prior to the time that you actually commenced or selected the location of the site here involved.

A. I scoured the countryside from San Francisco, Los Angeles, Newport Beach, and San Diego. I looked at sites in San Francisco. I looked at sites in Los Angeles, and I came down here to look at the various sites that were available. While it is true there were no other sites in San Diego available at that time, actually available, there was one site at the end of 28th Street that was available, that is to say, I could have gotten it by using—buying somebody else out of the picture and moving them off, and working a deal, anyway. I discarded all the sites in Los Angeles as completely not feasible for the kind of wet basins that we had in mind. These wet basins could not be built in Los Angeles economically. The condition of the Los Angeles soil is such that a 10-foot-thick concrete slab would have had to be put at the bottom of these basins. Also, the excavation costs would have been somewhere in the neighborhood of \$5 to \$10 a cubic yard alone for dewatering. By that I mean that when you dig a hole in the ground in most harbors in the

(Testimony of Carlos Tavares)

country you will find silting material and the water will come up and you have to resort to a lot of extra pumping and a lot of extra cost. [442]

While I thought this site was a very excellent site, the ground condition was one of the most important things that made us select this particular site, because when I took our original scheme to Washington the plant engineer there asked me, or he said, "Mr. Tavares, that is going to cost an awful lot of money. You are going to get yourself into an awful lot of trouble trying to build something like that, when you say you can build it for so much money."

I just said, "Well, that is my business, and it was my business to find out."

Also, in going over these various sites, I didn't find anything at that time that was, in my opinion, suitable for the type of operation that we had in mind. I was acquainted with Portland, Oregon, San Francisco, the back country at San Francisco, Los Angeles Harbor and San Diego Harbor. I did work also—at that time I was building a bridge close to Stockton across the Colony River. So when I say that this site was the only one for my operation on the West Coast of California, I mean where a shipbuilding plant such as I envisioned could be built economically.

Q. Was there a maximum amount in dollars in your agreement as to the moneys that would be available to you for the construction of this shipyard?

Mr. Landrum: That is objected to, if the court please. It is not the best evidence. I understand the agreement is [443] in evidence here.

The Court: I think it is, yes.

(Testimony of Carlos Tavares)

Mr. John M. Martin: I don't care to show the amounts. I would like to show that from time to time, as the shipyard was enlarged, the amounts were increased.

Mr. Landrum: That is right in the exhibit.

The Court: It is all covered.

Mr. John M. Martin: Very well.

Q. By Mr. John M. Martin: Prior to the commencement of the construction of this shipyard, had you had any experience in any other shipyard? A. Yes.

Q. Where, and when, and with whom?

A. Well, Kaiser and his bunch in Portland wanted me to build their shipyards, and asked me to put in a bid. I was too busy to do that work at that time. However, I did put in a bid.

Then I worked, together with the Raymond Concrete Pile Company, and did a portion of the work for the Consolidated Steel shipyard in Los Angeles. I bid on an awful lot of other shipyards, but I didn't do any work on any other ones.

Q. Now, in connection with your original design and layout of this shipyard, what, if any, consideration did you give to designing it in such a manner that it would be suitable for post-war construction of ships. [444]

A. Let me show you that on the plan.

Q. You can step to it, if you care to.

A. This shipyard is quite unique in many ways. When you build a ship, you bring your materials in here (indicating), and before that material gets into that ship you handle it probably about 80 times. Some pieces you handle maybe 125 times. The principle of production is such that if you can put your material here (indicating), handle it over to here, down all the way in a line, you

(Testimony of Carlos Tavares)

save an awful lot of time. This is an ideal shipyard due to its depth. As a matter of fact, any shorter than this would not be an ideal shipyard, because your cross traffic is going on all the time. Now, there is a certain amount of cross traffic, but that cross traffic is limited to a minimum in this particular shipyard.

We designed this shipyard with that main purpose. Then we designed these wet basins. These wet basins,—there aren't any in Los Angeles. There aren't any in San Francisco, except dry docks built by Kaiser for \$40,000,000 on six ways.

So you can see the material comes in here and goes out. In most shipyards the material comes in and goes out, and they have got a trestle up here, where the ship stands, way up in the air, and then it is launched. Now, all shipyards have a 1-way traffic, that is, they start building a ship here, and out she goes, and you can't bring it back. With this shipyard, you can open these gates and bring a ship back, [445] and you can do the reverse operation, send your materials out.

What does that mean? It means that you can repair ships. It means also that you can dismantle ships, salvage ships. It means also that you can knock these dog-goned gates out, and you can bring lumber schooners in, anything you want, and unload them. This whole shipyard was designed with a definite purpose. It is laid out this way, and you can put a fence here and you can sell this off to one party; and you put a fence here (indicating) and sell this off to another party, if you want to. You can do most anything with this shipyard. You have got buildings over here that you can use for building concrete pipe. For instance, you have an office building here,

(Testimony of Carlos Tavares)

which you can use for anything. You have the finest facilities. It is close to town. You have a highway going through here. You have got deep water. There are so many uses that this shipyard can be put to, and it is the only shipyard in—

Mr. Landrum: Just a moment. If the court please, I hate to arise, but I suggest that we proceed in the form of question and answer.

The Court: Yes.

Mr. Landrum: I do not want to be unfair, but I feel he should not lecture the jury.

The Court: You were waxing a little eloquent. [446]

Mr. Crouch: We except to the statement of counsel that the witness was trying to lecture the jury.

The Court: Oh, I don't think he was trying to lecture the jury. A man gets enthusiastic about his work. I do that myself sometimes. I notice that tendency on the part of the bar, too.

Proceed.

Q. By Mr. John M. Martin: Had you finished your statement, Mr. Tavares? A. I was shut off.

Q. Will you proceed and complete your statement, under the admonition which the court has just given you; in other words, not to make an argumentative talk to the jury, but make an explanatory statement of the specific post-war uses for which this shipyard was designed by you, as to which you were in the midst of your statement at the time of the interruption.

A. Well, as you can see, at any time you can have such a variety of operations in any one given plant, and you can adapt it to many different kinds of work. If there are no ships to build, you can repair ships, salvage

(Testimony of Carlos Tavares)

ships, bring other ships in. That would make an ideal tuna fleet basin, which is so lacking here in this town. I mean, anybody can see that the way that yard is laid out, the uses that yard can be put to are very numerous. [447]

Q. You mean it could have been used for a number of purposes other than ship construction?

A. Definitely.

Q. Will you enumerate some of those purposes?

A. Well, it can be used for a lumber yard; it can be used for a concrete pipe-making yard; it can be used even for building houses. It could be used for docking and handling a tuna fleet, building wood boats, building small steel ships, building concrete barges. I mean, almost anything.

Q. You mentioned the building of houses. Have you had any experience in that type of construction?

A. I am building a lot of houses now; about six hundred.

Mr. Landrum: If the court please, I move that answer be stricken, as certainly in 1944 no one could know that he could build six hundred houses in 1947.

Mr. John M. Martin: It is a qualification of the witness to testify as to the post-war use of the yard.

The Court: I think all uses and adaptations are proper. I don't know as to whether the witness' post-war experiences in housing, however, would illustrate his acumen at the time of acquisition.

Mr. John M. Martin: No, it is not offered for that purpose, if the court please.

The Court: All right. Motion denied. [448]

(Testimony of Carlos Tavares)

Q. By Mr. John M. Martin: Mr. Tavares, have you anything further to say with special reference to the drydocking facilities, as to what, if any, advantage that would be to possess such a yard, located as this yard was, for post-war work?

A. Well, the dry-docking facilities primarily are used for repairing and salvaging ships.

Q. Aren't there other dry-docking facilities immediately available in this area?

A. The only dry-docking facilities immediately available in this area is a large dry dock owned by the Navy, that is to say, at the destroyer base, and there is a smaller floating dry dock that also belongs to the Navy, or maybe several of them.

Q. I am referring, though, to privately-owned.

A. I don't think there is a single privately-owned dry dock in this harbor.

Q. Now, as to the general type of construction of these facilities and machinery, can you briefly state what consideration was given to the life of the plant, as you designed it? By that I mean the period over which it would be suitable for use.

A. There are some parts of the plant that were designed early in 1941, and due to the shortage of materials we were not able to design, for instance, dry docks 1 and 2 [449] on a permanent basis, but we made provision that in the event such a thing would occur, these basins could be readily changed from a temporary nature to a more permanent nature with a very small expenditure. But, as a whole, these facilities were built with the idea of following the D.P.C. requirements in our agreements with them. While the buildings were not elaborate, the

(Testimony of Carlos Tavares)

offices, none of them are elaborate, they would last 20 years, or maybe more. While none of the stuff that we put on is as elaborate as other shipyards, they were built solidly, permanently, and can be used for a long time.

Q. What would you say, in your judgment, would be the usable life of those graving docks, wet basins, as constructed?

A. Well, the wet basins 1 and 2, I would say the useful life would go from 10 to 15 years; maybe 10, maybe 15, depending on your maintenance. The graving docks 3 and 4, the steel sheet piles, are good for 50 years.

Q. What about the life of the batching plant?

A. Well, the life of the batching plant, that batching plant is about as good as any batching plant built as a batching plant. I don't remember—oh, that batching plant, if used every day and maintained, would last 20 years. We have not tried to build any plant that would last more than 40 or 50 years. I don't think any industrial plant [450] of this type is designed for more than 20 to 25 years.

Mr. John M. Martin: If the court please, pursuant to stipulation with counsel and with the permission of the court, I would like to read one short stipulation to the jury.

The Court: Very well.

Mr. John M. Martin: It has been stipulated, ladies and gentlemen of the jury, between counsel for the government and counsel for my clients that all of the aforesaid improvements, facilities and machinery were so furnished or constructed by Tavares Construction Company, Inc., without any compensation or fee for its supervisory services in connection therewith, other than the compen-

(Testimony of Carlos Tavares)

sation represented by the granting of D.P.C., which is an abbreviation for Defense Plant Corporation, to said defendants, Tavares Construction Company, Inc. of the option to purchase all, but not part, of said site, facilities and machinery, as set forth in paragraph 15 of the lease agreement. The paragraph 15 referred to is the paragraph 15 in Exhibit W, copies of which were handed the jurors yesterday.

Q. By Mr. John M. Martin: Mr. Tavares, from your experience in construction work, have you an opinion of the basis or amount of a fair supervisory fee for the performance by the contractor of services of the character, nature and extent as were performed by your company here for [451] the Defense Plant Corporation? The question is, have you an opinion. A. Yes, sir.

Q. Will you state that opinion? A. I feel—

Mr. Landrum: Just a moment. Now, if the court please, I suggest that the witness can state a figure there.

The Court: Yes. That does not require any elaboration.

Q. By Mr. John M. Martin: An opinion in dollars and cents, Mr. Tavares, or in percentage, either way?

A. There are so many kinds of a supervisory fee, and unless I can elaborate on it—

The Court: Suppose you take them all and give us the figures on all of them.

Mr. John M. Martin: I will shorten it, if the court please.

Mr. Landrum: Just a moment. If the court please, I feel that we are confined to this particular case. I feel that the question which has been propounded should say,

(Testimony of Carlos Tavares)

if I may be permitted: How much, in your opinion, was a reasonable supervisory fee for this supervision?

The Court: Of course, this is the project we are talking about, and the one in which we are interested. We are not interested in other projects. Manifestly, the [452] question must relate to the issue here, and not to something else.

Mr. John M. Martin: It was so intended, if the court please.

The Court: I so understood it, and you can confine the witness to so answering it.

Mr. John M. Martin: That is right.

Q. By Mr. John M. Martin: Mr. Tavares, you may further assume in stating your opinion that as one element of the supervisory service rendered the contractors guaranteed the maximum cost of the construction of such facilities and machinery.

Mr. Landrum: That is objected to upon the ground and for the reason that no foundation is laid. There is no showing in this case of any such thing.

The Court: I think the contract itself is there, and if you want to propound a hypothetical question, you had better take up the contract and phrase your question to specify just what you mean. The contract, with its amendments, is specific and unequivocal, and there is no question about its terms.

Mr. John M. Martin: I have previously included, or endeavored to include that by directing the witness's attention to Exhibit W, which represents the original lease, with all amendments. [453].